No. 91-740-CFY
Status: GRANTED

Title: Walter L. Nixon, Petitioner
v.
United States, et al.

Docketed:
November 4, 1991

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Stewart,David Overlock

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Nov 4 1991	G	Petition for writ of certiorari filed.
3	Nov 25 1991		Order extending time to file response to petition until January 6, 1992.
4	Jan 6 1992		Brief of respondent United States in opposition filed.
5	Jan 8 1992		DISTRIBUTED. January 24, 1992
6	Jan 8 1992	X	Reply brief of petitioner Walter Nixon filed.
8	Feb 14 1992		REDISTRIBUTED. February 21, 1992
9	Feb 24 1992		Petition GRANTED.
			**********
11	Mar 2 1992		Order extending time to file brief of petitioner on the merits until April 24, 1992.
12	Apr 24 1992		Brief of petitioner Walter Nixon filed.
13	Apr 24 1992		Joint appendix filed.
14	Apr 24 1992		Brief amicus curiae of Public Citizen filed.
16	May 20 1992		Order extending time to file brief of respondent on the merits until June 10, 1992.
17	Jun 10 1992		Brief amici curiae of Washington Legal Foundation, et al. filed.
18	Jun 10 1992		Brief of respondents United States et al. and amici curiae United States Senate filed.
19	Jul 1 1992		Record filed.
		*	Partial proceedings U. S. Court of Appeals for the District of Columbia Circuit.
20	Jul 10 1992		CIRCULATED.
21	Jul 13 1992	X	Reply brief of petitioner filed.
22	Jul 16 1992		Record filed.
		*	Original proceedings U. S. District Court for the District of Columbia (1 Box)
24	Jul 21 1992		SET FOR ARGUMENT WEDNESDAY, OCTOBER 14, 1992. (1ST CASE).
25	Sep 18 1992		Letter from counsel for the petitioner received and distributed.
26	Oct 14 1992		ARGUED.

(1)

91-740

No. ——

Supreme Court, U.S.
FILED
1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WALTER L. NIXON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was removed from office as a federal judge in 1989 following an impeachment trial before a committee of twelve Senators.

1. Whether the refusal of the court of appeals to review a claim that the Senate committee trial is unconstitutional is contrary to the holding in *Powell v. McCormack*, 395 U.S. 486 (1969), disrupts the constitutional balance of powers, and threatens judicial independence.

2. Whether a committee trial on perjury charges, in which eighty-eight members of the Senate are unable to evaluate witness credibility, violates the express constitutional command that the Senate "try all Impeachments."

LIST OF PARTIES TO THE PROCEEDING IN THE U.S. COURT OF APPEALS

WALTER L. NIXON, JR.
Appellant

UNITED STATES OF AMERICA,

JAMES A. BAKER, III,
U.S. Secretary of State,

and RALPH MECHAM,
Director of the Administrative Office
of the United States Courts,
Appellees

UNITED STATES SENATE
Amicus Curiae

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

Walter L. Nixon, Jr. hereby petitions for issuance of a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit in *Nixon v. United States*, No. 90-5246, issued on July 9, 1991.

OPINIONS BELOW

The three opinions of the court of appeals (Pet. App. A, at 1a-57a, *infra*) are reported at 938 F.2d 239 (D.C. Cir. 1991). The opinion of the court of appeals denying a petition for rehearing (Pet. App. F, at 84a-85a, *infra*) is unreported. The district court decision affirmed by the court of appeals (Pet. App. B, at 58a-69a, *infra*) is reported at 744 F. Supp. 9 (D.D.C. 1990).

JURISDICTION

The decision of the court of appeals was issued on July 9, 1991. A petition for rehearing was denied on August 5, 1991 (Pet. App. E, at 83a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND SENATE RULE INVOLVED

The following provisions of the Constitution are set out in the Appendix (Pet. App. G, at 86a-87a, *infra*):

Article I, section 2, clause 2

Article I, section 3, clause 6

Article I, section 5, clauses 1 and 2

Article III, section 2, clause 3

Amendment VII

Senate Impeachment Rule XI also is set out, in relevant part, in the Appendix (Pet. App. G, at 87a-88a, *infra*).

STATEMENT

1. The Nixon Investigation Unearthed No Underlying Crimes, But Resulted In A Perjury Conviction

In late 1983, the Federal Bureau of Investigation received an anonymous tip falsely accusing petitioner, then Chief Judge of the U.S. District Court for the Southern District of Mississippi, of accepting a gratuity from Wiley Fairchild to intervene in the state court prosecution of Fairchild's son. *See* Hearings before the Senate Impeachment Trial Committee, S. Hrg. No. 247, 101st Cong., 1st Sess., Pt. 2 at 17, 28, 30; Pt. 3 at 501, 572-73, 1136, 1263; Pt. 4A, Vol. I at 275-299 (1989) (hereinafter cited as Imp. Rec. Pts. 1-13).[1] An FBI investi-

[1] Thirteen volumes, constituting the complete record of proceedings in the Senate Impeachment Trial Committee, the House of Repre-

gation began in April 1984, and during the summer a grand jury was convened on the matter. *Id.* Pt. 2 at 41, 134, 240; Pt. 3 at 1537-39; Pt. 4A, Vol. I at 811-12; Pt. 4B, Vol. I at 449-50.

Nixon immediately demanded to appear before the grand jury. He testified fully and with supporting documentation about his business relations with Mr. Fairchild. *Id.* Pt. 2 at 241, 288, 297; Pt. 3 at 53-98, 432. Nixon also testified that he had never discussed the state court criminal action with the prosecutor, Bud Holmes. *Id.* Pt. 2 at 241, 252, 280-81, 287-88, 316-17; Pt. 3 at 48-106; Pt. 4B, Vol. I at 467-69.

The grand jury indicted Nixon for accepting an illegal gratuity and on three perjury charges. At trial, Nixon's testimony was materially contradicted only by Holmes, who himself had been indicted on five perjury counts but pled guilty to a single charge of contempt of court in return for his testimony against Nixon.

Holmes testified in court that Nixon had approached him to "put in a good word" for Fairchild's son. *Id.* Pt. 4A, Vol. I at 736-37. He further testified that, following Nixon's grand jury appearance, Nixon asked Holmes not to divulge this prior conversation. *Id.* at 764-65. Nixon, however, vehemently denied ever having sought to influence the prosecution of Fairchild's son or to silence Holmes. *Id.* Pt. 4A, Vol. II at 1546-47, 1558, 1570, 1575, 1589-91, 1599-1600. He testified that he had had one brief conversation with Holmes in which he had mentioned the Fairchild case in passing, but that it had occurred after the criminal case had concluded. *Id.* at 1539-40. Nixon also testified that when he appeared before the grand

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sentatives, and the courts (with respect to petitioner's criminal proceedings), were compiled by the Senate Impeachment Trial Committee ("Senate Committee") and transmitted to the Senate. The volumes were marked as Appendix 4 to Plaintiff's Motion for Summary Judgment filed in the district court on February 20, 1990.

jury, none of the questions asked of him brought back his recollection of this conversation. *Id.* at 1592-93; *see also id.* Pt. 2 at 241, 252, 280-81; Pt. 4B, Vol. I at 451.

The jury acquitted Nixon on the gratuity charge and on one of three perjury counts. Nixon was convicted on two charges of perjury for failing to report his conversation with Holmes to the grand jury. *United States v. Nixon*, 816 F.2d 1022 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988).

2. Senate Impeachment Proceedings: Only Twelve Senators Heard The Witnesses In This Perjury Case

On May 10, 1989, the House of Representatives adopted three articles of impeachment against Nixon. H. Res. 87, 101st Cong., 1st Sess. (135 Cong. Rec. H1802-03, 1811) (daily ed. May 10, 1989), *reprinted at* Imp. Rec., *Impeachment of Judge Walter L. Nixon, Jr.*, S. Doc. No. 8, 101st Cong., 1st Sess., 19-25 (1989). The House based the first two articles on Nixon's convictions. Article III charged that in his grand jury testimony, as well as in a tape-recorded FBI interview in April 1984, Nixon made up to fourteen false statements about conversations with Messrs. Fairchild and Holmes.

The articles of impeachment were exhibited in the Senate on May 16, 1989. Shortly thereafter, the Senate adopted Resolution 128, pursuant to Senate Impeachment Rule XI. *See* S. Res. 128, 101st Cong., 1st Sess. 135 Cong. Rec. S5133-34 (daily ed. May 11, 1989), *reprinted at* Imp. Rec., Comm. Report at 97-98. Resolution 128 appointed a committee of twelve Senators—six from each party—"to receive and to report evidence" on the articles of impeachment. *Id.* The Senate authorized the committee to submit a "certified copy of the transcript of the proceedings and testimony had and given before it," and to "report to the Senate a statement of facts . . . and a summary . . . of evidence that the

parties have introduced on the contested issues of fact." *Id.*

After denying Nixon's motion for trial before the full Senate (Imp. Rec., Pt. 1, at 319-21), the committee conducted the trial on four days in September. *Id.* Pt. 2. A quorum of seven Committee members was required to commence each session. Ten live witnesses testified, and the Committee received a large volume of written materials, including the record of Nixon's criminal trial, the post-conviction proceeding, and the House impeachment hearings. *Id.* Pts. 3, 4A (Vols. I and II), 4B (Vols. I, II, and III), and 4C.

Once again, former prosecutor Holmes was the principal accuser. Holmes admitted that he lied before the grand jury on three separate occasions. Imp. Rec., Comm. Report at 33. In House testimony, Holmes had repudiated both a sworn affidavit he had signed four months earlier, and sworn deposition testimony. Imp. Rec., Pt. 4B, Vol. 1 at 310-15 (1988). Before the Senate Committee, when asked which of his several conflicting sworn statements was true, Holmes replied, "You can use any one you want." Imp. Rec., Pt. 2 at 144.

The Senate Committee proceedings were transmitted by closed-circuit television to Senate offices and were videotaped for later review by any Senators so choosing. As the district court noted, however, "[t]he record is silent as to how many Senators took advantage of these opportunities to view the committee proceedings." *See* Pet. App. B, at 60a.

Following submission by the parties of proposed findings of fact, the Senate Committee issued a report purporting to summarize the trial evidence. Imp. Rec., Comm. Report. The report contained a critical warning:

> Many specific details—including some that are very important—about each of [three pivotal] conversations are disputed by the parties. Indeed, the com-

> mittee received dramatically inconsistent testimony concerning the substance, date, and result of these conversations from the participants in the conversations themselves . . . . Familiarity with these witnesses' various, and divergent, testimony concerning these three conversations is critical to obtaining an understanding of the parties' respective positions.

Pet. App. B, at 60a. That warning reflected a critical fact: the case against Nixon turned entirely on the question of witness credibility. Yet only the members of the Senate Committee—twelve of one hundred Senators—actually heard the testimony of Nixon and Holmes, and had an opportunity to scrutinize witness demeanor, tone of voice, facial expressions, and other factors necessary to determine who was telling the truth.

The report issued by the Senate Committee also erroneously omitted key passages of Nixon's criminal trial testimony and inaccurately claimed that Nixon's Senate testimony "contrasted" with his trial testimony. Imp. Rec., Comm. Report at 74. As Nixon argued to the Senate, these errors were especially damaging in light of the Committee's recognition that witness credibility was crucial. Accordingly, Nixon renewed his motion for trial on the Senate floor. Imp. Rec., Proceedings at 162 n.4.

On November 1, without seeing witnesses or hearing their testimony, the full Senate heard closing arguments. The President Pro Tempore then addressed to counsel written questions from individual Senators. The entire session lasted less than four hours. Imp. Rec., Proceedings at 357-422; 135 Cong. Rec. S14493-517 (daily ed. Nov. 1, 1989).

The Senate met in executive session for six hours on the following day, returning to vote on November 3. The Senate first voted 90-7 to deny Nixon's renewed motion for trial before the full Senate. Imp. Rec., Pro-

ceedings at 429-30; 135 Cong. Rec. S14634 (daily ed. Nov. 3, 1989). The Senate then voted to convict on Article I by a margin of 89-8, and on Article II on a vote of 78-19. The Senate acquitted on Article III. *Id.* at 432-34.

The two convictions were certified by the Secretary of the Senate and copies were deposited with defendant James A. Baker, U.S. Secretary of State. Respondent Ralph Mecham, Director of the Administrative Office of the United States Court, then directed the termination of Nixon's salary and benefits as a federal judge.

3. A Biased Procedure: Uninformed Senators Ordinarily Vote To Convict

Senators who did not serve on the Senate Committee, and who thus neither heard the evidence nor saw the witnesses, voted to convict Nixon in proportionately greater numbers than did the members of the Senate Committee:

—On Article I, 75% of the Senators who served on the Senate Committee voted to convict, while 94% of the remaining Senators did so;

—On Article II, only 58% of the Committee members voted to convict, while 84% of the remaining Senators did so;

—And on Article III, only 42% of the Committee members voted to convict, while 61% of the remaining Senators did so. *See* Pet. App. A, at 22a n.2.

As reflected in Appendix H to this Petition, the Senate vote on Nixon's impeachment repeated a disturbing pattern established in the 1986 impeachment of Judge Harry Claiborne and the 1989 impeachment of Judge Alcee Hastings: those eighty-eight Senators who do not serve on the impeachment committee, and thus neither hear the evidence nor see the witnsss, disproportionately

favor the prosecution. With respect to the Hastings and Nixon impeachments, the Senate voted on a total of eighteen impeachment Articles; on seventeen of those eighteen Articles, the Senators who actually heard the evidence supported the accused in significantly greater proportions than did the other Senators.[2]

This variation in votes between committee members and other Senators is not merely a statistical curiosity; as the district court acknowledged, it often reflects the difference between winning and losing. Of the ten impeachment articles on which Judges Hastings and Nixon were convicted, nine failed to attract a two-thirds majority of the trial committee members. *See* Pet. App. B, at 62a. On Article II against Nixon, only 58% of the committee members voted to convict. *See* Pet. App. A, at 23a n.3. If the prosecution had to carry two-thirds of the Senators who actually heard the evidence, Nixon would have been acquitted on Article II, and Judge Hastings would still sit on the federal bench.

4. Senate Impeachment Rule XI: Senators Avoid "Dreary" Trials

This case concerns only the third impeachment ever conducted by a Senate committee. Until 1986, the Senate conducted all impeachment trials on the Senate floor, in full view of all Senators. Of eleven impeachment trials held on the Senate floor, the accused prevailed seven times. *See* "Impeachment: Selected Materials," House Judiciary Committee Print, 93d Cong., 1st Sess. 682-88 (1973) [hereinafter cited as "Impeachment Materials"].

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[2] On the eighteenth Article (Article XVI against Judge Hastings), the committee members and non-committee members both voted unanimously to acquit. The votes described in Appendix H are reported in Imp. Rec., Proceedings at 432-36 (Nixon vote), and the Congressional Record (*see* 135 Cong. Rec. S13782-88 (daily ed. Oct. 20, 1989) (Hastings vote); 132 Cong. Rec. S15760-62 (daily ed. Oct. 9, 1986) (Claiborne vote).

In contrast, all three judges tried before a committee under Rule XI have been convicted.

As adopted, Senate Impeachment Rule XI provides that

> in the trial of any impeachment the Presiding officer of the Senate, upon the order of the Senate, shall appoint a committee of 12 Senators to receive evidence and take testimony at such times and places as the committee may determine. . . .
>
> The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

Sen. Imp. Rule XI, reprinted in Senate Manual, S. Doc. No. 1, 98th Cong., 2d Sess. 174 (1984); Pet. App. G, at 87a.

The Senate adopted the current version of Rule XI in 1935. The rule's sponsor, Senator Ashurst, later explained that the impeachment trial of Judge Harold Louderback of New York had been "dreary, involved, and protracted," 80 Cong. Rec. 3425 (1936), and that "at least forty" Senators had urged the Judiciary Committee to find a less onerous method for trying impeachments. *Id.* Rule XI was the result. *Id.* Yet even prior to its adoption, several Senators had expressed concern that the committee procedure did not comply with the Senate trial requirement of the Constitution. *See, e.g.*, 78 Cong. Rec. 9928-29 (1934) (Senator Borah); 56 Cong. Rec. 698-99 (1912) (Senator Bailey).

One year after its adoption, moreover, the Senate declined to invoke the rule to try District Judge Halsted Ritter on articles of impeachment. At that time, the constitutionality of the rule was again questioned. *See, e.g.*, 80 Cong. Rec. 3425 (1936) (Senator Austin). To allay these concerns, Senator Ashurst described the new rule as applying only with the consent of the accused. Thus, he assured the Senate that the committee procedure should only be invoked "if and when the respondent was willing thus to have the testimony taken by a committee and the managers also were thus willing." *Id.* at 3425-26.

In the three impeachments over the last five years, that assurance has not been honored. In 1986, the Senate denied the request of Judge Claiborne for an impeachment trial before the Senate, and it did the same for Judges Hastings and Nixon in 1989.

5. Proceedings Below

On June 1, 1989, Judge Hastings filed an action against the Senate and several Senate employees, raising eleven challenges to the impeachment procedings against him. Judge Nixon intervened, solely to challenge the committee trial procedure as violating Art. I, § 3, cl. 6 of the Constitution. The district court dismissed the action. *Hastings v. United States Senate*, 716 F. Supp. 38 (D.D.C. 1989), (Pet. App. C, at 70a-78a), *aff'd mem.*, 887 F.2d 332 (D.C. Cir. 1989). The court of appeals affirmed on the single ground that the action was premature, since neither plaintiff had yet been convicted by the Senate or removed from office. *Hastings v. United States Senate*, No. 89-5188 (D.C. Cir. 1989) (Pet. App. D, at 79a-82a).

Following his conviction by the Senate in November 1989, Nixon brought this declaratory action against the United States and the executive and judicial officers who implemented his removal from office. Ruling on the par-

ties' cross-motions for summary judgment, the district court expressed considerable agreement with Nixon's constitutional claim, but nevertheless held the action nonjusticiable. *See* Pet. App. B.

The court of appeals affirmed, with the panel writing three different opinions. The opinion for the court by Judge Williams held that the case presented a nonjusticiable political question and did not reach the merits of petitioner's constitutional claim. Judge Williams wrote that since the Framers selected the Senate over the Supreme Court to conduct impeachment trials, they must have intended for the courts to be powerless in any case concerning impeachments. Judge Williams distinguished *Powell v. McCormack*, 395 U.S. 486 (1969), by noting that the House of Representatives in that case had exceeded an express textual limitation on its authority to judge the qualifications of its members.

A concurring opinion by Judge Randolph expressed doubt that the political question doctrine applied. Nevertheless, Judge Randolph held that since the courts were not identified in the Constitution as having any authority over impeachments, they are not empowered to review any aspect of impeachment proceedings.

Judge Edwards sharply disagreed with his colleagues on justiciability, finding the political question doctrine inapplicable. Pointing to this Court's decision in *Powell*, Judge Edwards wrote, "[i]t is the court's task to interpret and give content to the word 'try' [in the Impeachment Clause], just as it was the Court's job in *Powell* to give meaning to the word 'Qualifications'" in Article I, § 5. Pet. App. A, at 34a. Judge Edwards went on to conclude, however, that trial by committee "can be accommodated" within the Impeachment Clause. *Id.* at 48a.

Petitioner filed a timely petition for rehearing, which was denied on August 5, 1991. Pet. App. E, at 83a.

REASONS FOR ALLOWING THE WRIT

The impeachment process involves the most fundamental confrontations among the coordinate branches of government. Through impeachment, Congress retains the ultimate power to remove judges and executive officials who prove irresponsible, unworthy, or despotic. But, always sensitive to the need to impose checks and balances on such ultimate power, the Framers deliberately established a cumbersome and unwieldy impeachment process that requires action by both Houses of Congress, a Senate trial, and a two-thirds vote. If Congress could remove a judge easily, the independence of the federal judiciary would be fatally compromised. If presidential and executive impeachments were uncomplicated, legislative tyranny could result.

This case presents the question whether the Senate can defeat this constitutional balance by unilaterally streamlining an impeachment process that was intended to be "dreary" and "protracted." Nor will this streamlining necessarily stop with Rule XI. In fact, the Senate in this case maintained below that it can conduct an impeachment trial without a single Senator hearing a single witness, arguing that it may "try an impeachment based upon a written evidentiary record created through full and fair adversary proceedings." [3] The Court thus should review this case to consider (1) whether the Senate's violation of the Impeachment Clause is insulated from court review, and (2) whether use of the biased procedure of trial by committee satisfies the command that the Senate "try all Impeachments."

1. Article I, § 3, cl. 6 of the Constitution provides that "The Senate shall have the sole Power to try all Impeachments." This provision empowers the Senate alone to con-

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[3] Memorandum to the District Court of the United States Senate As Amicus Curiae In Support Of Judgment For Defendant (March 28, 1990), at 54.

duct impeachment trials, but the discretion afforded the Senate is not unlimited. The Senate must act under oath, it cannot remove from office without a two-thirds majority, and it must adhere to the express requirement that it "try all Impeachments." If the Senate does not meet these specific requirements, the courts must enforce the literal terms of the Constitution.

The lower courts' refusal to decide the constitutional issue presented here directly conflicts with *Powell v. McCormack* and *INS v. Chadha*, 462 U.S. 919 (1983), which define the limits of the political question doctrine and principles of justiciability. While the Senate has "sole power" to try impeachments, the court of appeals erroneously construed that power to preclude judicial review of violations of the Impeachment Clause. The phrase "sole power" surely bars trial of impeachments by any entity other than the Senate, thereby settling a dispute at the Constitutional Convention over whether the courts should conduct impeachment trials. But the Senate's sole power to try the case does not bar judicial review in the narrow category of cases involving whether the Senate has complied with express constitutional requirements. What if the Senate purported to remove a judge by a simple majority vote rather than a two-thirds majority? Or if the Senate refused to permit the Chief Justice to preside at a presidential impeachment? Violations of the Impeachment Clause itself must be reviewed by the courts.

2. The Senate must "try all Impeachments." Art. I, § 3, cl. 6. To "try" a case, according to the ordinary meaning of the word, necessarily means that the trier hear and see the evidence. The Framers' use of the term "try" reflects the intent that the Senate, and not some fraction of the Senate, shall be the trier and thus conduct the trial itself. Only a trial by the Senate, moreover, is consistent with the Framers' goal of a "numerous" impeachment court that would protect the independence of

the judiciary. Indeed, trial by committee is an unconstitutional shortcut that is sharply biased against the accused. Finally, the most authoritative construction of that phrase is the Senate's practice until 1986 of conducting impeachment trials on the Senate floor, as part of the regular business of the Senate.

I. VIOLATIONS OF THE IMPEACHMENT CLAUSE ARE JUSTICIABLE

Under the majority opinions below, the federal courts do not have the power to "say what the law is" under the Impeachment Clause. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). That broad conclusion can dangerously inflate an ultimate legislative power that is readily subject to abuse. Although the Senate's power over impeachment trials may be plenary, it is not absolute; the Constitution remains a check on that power, and the courts must restrain its exercise within constitutional limits. *See Oneida v. Oneida Indian Nation*, 470 U.S. 226, 249 (1985); *cf. Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

According to the court of appeals, the Senate's authority to try impeachments amounts to a "textually demonstrable constitutional commitment" of the issue which, along with the "need for finality," requires application of the political question doctrine. *Cf. Baker v. Carr*, 369 U.S. 186, 217 (1962). This conclusion, however, directly conflicts with *Powell v. McCormack*, 395 U.S. 486 (1969).

Powell concerned a challenge to the authority of the House of Representatives to "Judge . . . the Elections, Returns and Qualifications of its own Members." Art. I, § 5, cl. 1. The Court concluded that the Framers intended to restrict the qualifications that the House could "judge" to the standing requirements enumerated in Art. I, § 2, cl. 2. Thus, even though the Constitution establishes a "demonstrable textual commitment" to the House of the power to judge its members' qualifications, the courts retain the power to determine whether House ac-

tion to exclude a Member exceeded constitutional limits. 395 U.S. at 548.

Under *Powell*, even where the constitutional text plainly assigns a power to Congress, courts must review claims that Congress has exceeded an express limitation on that power. *See also Morgan v. United States*, 801 F.2d 445, 448 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 911 (1987) (judicial review in Powell authorized because "House action in question did *not* consist of judging 'qualifications' within the meaning of the provision") (emphasis in original).[4] Courts must interpret the constitutional text to determine the limits of the power conferred upon the Congress, and then review whether congressional action compiled with those limits. That is all that Nixon seeks here.

INS v. Chadha, 462 U.S. 919 (1983), further demonstrates that the political question doctrine is no bar to judicial review here. *Chadha* squarely rejected the contention that congressional action could not be challenged in the courts because Congress had taken the action pursuant to a constitutional grant of power: "The plenary authority of Congress . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." *Id.* at 941. Finding a political question in such circumstances would mean that "virtually every challenge

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[4] In *Morgan*, a group of private citizens challenged the determination of the House of Representatives that one of two candidates competing to represent an Indiana congressional district was lawfully elected to that body. The court of appeals ruled that the Constitution made plain the authority of the House to be "*the* Judge" of the elections of its members, 801 F.2d at 447 (emphasis in original), and thus that the court "simply lack[ed] jurisdiction to proceed." *Id.* In so ruling, however, the court specifically disclaimed reliance on the "amorphous and partly prudential doctrine of 'political questions,'" *id.*, and emphasized that its holding "does not, of course, preclude all judicial challenges bearing any relationship to legislative resolution of disputed elections. It is conceivable, for example, that in investigating such a dispute a House might go beyond its constitutional power to compel witnesses." *Id.* at 451.

to the constitutionality of a statute would be a political question" and thus the courts would be unable to perform the role assigned to them in the Constitution. *Id.*

In considering whether there is a "textual commitment" strong enough to preclude all judicial review, the court of appeals fastened on the phrase that the Senate has "sole power" to try impeachments. Judge Williams cited a 1936 Claims Court case for the proposition that the "sole power" phrase means that "the Senate should act without any other tribunal having anything to do with the case." Pet. App. A, at 4a.[5] But this reasoning leads to the indefensible result that courts could not intervene to enforce the Constitution under any circumstances—even when the trial is based entirely on a written record (as the Senate argued), or is conducted before a group of schoolchildren (as Judge Williams acknowledged). Pet. App. A, at 14a. The inconsistency of this reasoning is highlighted by Judge Williams' concession that at least some constitutional limitations on the Senate's impeachment trial powers could be enforced by the courts. Pet. App. A, at 15a n.2.

As explained more fully in Section II below, the Framers intended that the Senate, as opposed to the Supreme

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[5] The Claims Court case is *Ritter v. United States*, 84 Ct. Cl. 293, 296 (1936), *cert. denied*, 300 U.S. 668 (1937), which held that the court had no authority to determine whether any of the articles of impeachment on which plaintiff had been convicted charged impeachable offenses, or whether the Senate could try him on an article which incorporated allegations contained in other articles on which plaintiff had been acquitted. No challenge was presented there to the Senate's "trial by committee" procedure. Moreover, to the extent the *Ritter* dictum that "no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment" means that the judiciary cannot review any aspect of congressional impeachment proceedings, that dictum cannot be squared with this Court's later ruling in *Powell v. McCormack*, 395 U.S. 486 (1969). Nor, as discussed *infra* in text, is that dictum consistent with Judge Williams' ultimate concession that at least some congressional transgressions under the Impeachment Clause are reviewable by the courts. *See* Pet. App. A, at 15a n.2.

Court, should have the "sole power" to try impeachments. *See infra* at 21-23. But nothing in the text or history of the Constitution suggests that the Framers intended that the Senate's failure to comply with the express terms of the Impeachment Clause should be uniquely insulated from court review.

That the challenged impeachment procedures are embodied in a Senate rule, adopted under its rulemaking power in Art. I, § 5, cl. 2 of the Constitution, does not change this result. Congressional rules are not exempt from judicial review because they are authorized by the Constitution, and the requirement that they comply with the Constitution is not lessened because they govern "internal" procedures only. *See United States v. Ballin*, 144 U.S. 1, 5 (1892) (although Constitution empowers each House to determine its rules, Congress "may not by its rules ignore constitutional restraints or violate fundamental rights"); *see also Morgan*, 801 F.2d at 449-50 ("Authorization to determine rules of proceedings does not inevitably exclude review of the lawfulness of those rules.").[6]

Judge Randolph's suggestion that review of Nixon's claim would open the "floodgates" of impeachment litiga-

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[6] In support of its rules clause argument, the court of appeals cited a previous case from the same circuit, *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983). But *Vander Jagt* strongly supports review here. Fourteen members of the House of Representatives sued the House Leadership over an alleged "systematic discrimination" against them with respect to committee assignments. The court of appeals expressly rejected a political question defense based on congressional action under Art. I § 5, cl. 2. According to the court there, "Article I simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt. Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity." *Id.* at 1173. Although the court made clear that the political question doctrine presented no obstacle to judicial review, *id.* at 1173-74, 1177, it ultimately declined to award relief because the case was "essentially a suit by some members of Congress against others." *Id.* at 1175.

tion, and Judge Williams' desire to ensure "finality," are similarly without force. *See* Pet. App. A, at 13a, 16a-17a. A court decision applying the express terms of the Impeachment Clause need not lead to endless litigation any more than *Powell v. McCormack* has submerged the courts in disputes over congressional qualifications. If an express constitutional limitation is violated, judicial review must be available. Equally, this Court has made clear that justiciability cannot turn on speculative predictions such as whether future impeachment trial challenges might arise. Pet. App. A, at 13a; *see also id.* at 14a-15a (Randolph, J., concurring). In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court declined to focus justiciability analysis on "such amorphous and wide-ranging factors . . . [as] the potential practical problems with allowing [judicial] review" because it would "alter substantially the analysis in *Baker v. Carr*." *Id.* at 126-27.

Nor is it an acceptable response, when one branch violates a clear constitutional limit on its power, to say, as did Judge Williams, that the nation's only recourse is at the ballot box. Pet. App. A, at 15a. Neither may courts merely throw up their hands when confronted with the possibility of extreme constitutional transgressions, lamenting that in those circumstances "the republic will have sunk to such depths [that] no court could rescue it." *Id.* at 14a-15a. That position is antithetical to the concept of judicial review, and constitutes an abandonment of the courts' responsibility under the Constitution.

By abdicating its responsibility to "try" impeachments, the Senate overstepped its powers in the critical balance between the coordinate branches struck by the Impeachment Clause. Such a constitutional violation is fully reviewable by the courts. This conclusion is powerfully reinforced by the critical importance of the core constitutional values that hang in the balance here: by unilaterally changing the impeachment procedure prescribed by the Constitution, the Senate has arrogated to itself

greater power over the executive and the judiciary, to be exercised with less care.

II. TRIAL BY COMMITTEE IS UNCONSTITUTIONAL

The Constitution explicitly commands that the "Senate shall have the sole Power to try all Impeachments." Although the Senate is the only entity that may try impeachments—it has "sole power" to do so—there is no ambiguity in the constitutional direction that the Senate itself must actually perform this task. In this case, however, the Senate refused this command, and subjected Nixon to a constitutionally deficient procedure.

The question of the constitutionality of committee trials was briefed and argued below, and is ripe for decision. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984); *cf. Ramsey v. United Mine Workers*, 401 U.S. 302, 312-13 (1971). Moreover, Judge Edwards specifically addressed the constitutionality of the committee trial procedure, and approved it on the grounds that (1) the Framers intended that impeachment trials be conducted with "greater procedural flexibility" than criminal trials, Pet. App. A, at 47a, and (2) early Seventeenth Century precedent from England "may be read to suggest that the Framers did not intend to foreclose the possibility [of using impeachment committees] in American constitutional practice." *Id.* at 36a. Neither argument, however, can overcome the clear command of the Constitution that the Senate try all impeachments, especially since an impeachment trial by committee is inherently and demonstrably unfair to the accused.

A. Constitutional Text

Article I, section 3, clause 6 of the Constitution provides that the Senate shall "try all Impeachments." By using the term "try," the Constitution directs the Senate to conduct the trial—including the taking of evidence and the hearing of testimony—and not merely to vote.

The Impeachment Clause does not give the Senate the power to "judge" impeachments; it requires the Senate to "try" them. The distinction is critical, and demonstrates that the Framers intended the Senate to do more than merely render "independent final judgment" in executing their impeachment trial responsibilities. *Cf. Roudebush v. Hartke*, 405 U.S. 15, 25 (1972). Nor does the Impeachment Clause use verbs such as "review," "vote on," or "convict," which might suggest that the Senate need not actually conduct impeachment trials by hearing evidence and reaching judgment. Indeed, the term "try" does not have a radically different meaning today than it did when the Constitution was drafted; one 1780 dictionary defined "to try" as, *inter alia*, "to examine as a judge; to bring before a judicial tribunal." T. Sheridan, *A Dictionary of The English Language* (1780); *compare Black's Law Dictionary*, 1358 (5th ed. 1979) ("to try" means "[t]o examine judicially. To examine and investigate a controversy by the legal method called 'trial' for the purpose of determining the issues it involves.").

This interpretation of "try" is reinforced by those other constitutional provisions that employ that term and its cognates. Thus, Article III directs that the "Trial of all Crimes, except in Cases of Impeachment, shall be by jury . . . ." Art III, § 2, cl. 3. That provision certainly contemplates that the jury shall try the case by hearing the evidence, not by appointing a committee of two or three jurors to hear witnesses and prepare a written report for the other jurors. Similarly, the Seventh Amendment describes both "trial by jury" and facts "*tried* by a jury" (emphasis added). The latter phrase plainly reflects the understanding that a fact or a case may be "tried" only when it is received as a jury would receive it: through observation of live testimony.[7]

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[7] The opinion of the trial court below underscores this point. According to the court, "[t]here are significant differences between

The structure of the Impeachment Clause further supports the conclusion that committee trials violate the Constitution. The Clause describes the Senate "sitting" for the purpose of trying articles of impeachment, just as judge and jury would "sit" at trial—hearing witnesses and weighing evidence. *See* Art. I, § 3, cl. 6. Senators are also to be under "Oath or Affirmation" during the proceedings, as is a jury sitting at trial. *Id.* And when the President "is tried" on articles of impeachment, the Chief Justice is to preside. Surely the Chief Justice was not expected to preside over a committee of twelve, but rather over the full Senate in trying the impeachment. *Id.*[8]

B. The Constitutional Debates

The deliberations of the Framers are entirely consistent with the plain meaning of the text that the Senate itself must try the impeachment case. Above all, the Framers wanted an impeachment process that would guard the independence of the judiciary and the Executive, and that would not grant arbitrary power to Congress. In explaining the need for life tenure of judges, Madison argued that if federal judges had to be reappointed, they "might be tempted to cultivate the Legislature, by undue complaisance, and thus render the Legislature the virtual expositor, as well as the maker of the

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the consideration given to a matter by triers of fact who confront live witnesses and those who view the testimony secondhand in a transcript or from oral or video tape. This difference is reflected in the Seventh Amendment's limitation on trial and appellate court review or re-examination of a 'fact tried by a jury.'" Pet. App. B, at 65a.

[8] The trial court, after considering the constitutional text, concluded that "[t]here are thus strong contextual indications that if the Framers could speak today, they might well say that they intended impeachments to be tried to the Senate, sitting as a court on questions of law and as jurors on questions of fact." Pet. App. B, at 64a.

laws." 2 M. Farrand, *Records of the Federal Convention* at 34 (Sept. 8, 1787) (hereinafter *"Convention Records"*). Hamilton agreed that the independence of the judiciary was a paramount value, arguing that "all possible care is requisite to enable it to defend itself against [the other branches'] attacks." *The Federalist* No. 78, at 504 (E. Earle ed. 1937).

To the Framers, this paramount value could be preserved only if impeachment were a burdensome and time-consuming process. Thus, the delegates rejected a proposal by John Dickinson that federal judges be removed by majority vote of either the House or Senate, without a trial. *See Convention Records*, at 428. The Dickinson proposal, modeled after the English practice of removal by "address," was rejected because it would "weaken[] too much the independence of the Judges." *Id.* at 428-29 (remarks of E. Randolph).

Instead, the Framers chose the two-step impeachment process, in which the House impeaches and the Senate tries, with conviction in the Senate by a two-thirds majority. According to Hamilton, this cumbersome procedure is "the only provision [for the removal of judges] which is consistent with the necessary independence of the judicial character." *The Federalist* No. 79, at 514; *see also The Federalist* No. 66, at 430.

The Framers also insisted that impeachment trials be conducted before a "numerous" body. Because of the significance and volatility of impeachments, which involve head-on clashes between branches of government, impeachment trials must be conducted by a body of sufficient public stature to reconcile the public to potentially unpopular decisions. Yet the Framers refused to assign impeachment trials to the Supreme Court specifically because it was "too few in number." *Convention Records*, at 551 (G. Morris commenting on Madison's proposal for Supreme Court to conduct impeachment trials). Hamilton explained why:

> There will be no jury to stand between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.

The Federalist, No. 65, at 426. Thus, the numerous Senate was the only tribunal that could be trusted to reach the correct decision, *see Convention Records*, at 551 (remarks of G. Morris), even though "reasonable attention to economy" might argue for the conduct of impeachment trials by a less numerous body. *The Federalist* No. 65, at 425. *See also id.* No. 66, at 434 (Senate to be "a court of impeachments"); *id.* No. 65, at 423 (Constitution allots to Senate power of a "judicial character as a court for the trial of impeachments").

Perhaps the most persuasive evidence on the meaning of the Impeachment Clause is the most obvious: What did the Senate do in the first impeachments? Did the Senate, while the Framers still lived and participated in our public life, conduct impeachment trials by committee, or before the full Senate? The answer is unambiguous. Through eleven impeachment trials until 1986, the Senate truly discharged its constitutional obligation to conduct impeachment trials before the Senate itself.[9]

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[9] For this reason, Judge Edwards' reliance on Jefferson's Manual of Parliamentary Practice is misplaced. *See* Pet. App. A, at 52a. Although Jefferson noted in his Manual that committees had been used for evidence-gathering purposes in England, *id.*, the Senate, during the period contemporaneous with the lives of the Framers—including the period during which Jefferson presided over the Senate as Vice President—never once used the committee procedure to try impeachments. Nor does it appear that committees were used in the many impeachment trials conducted by the colonial governments and the new states at the time the Constitution was drafted. *See* P. Hoffer and N. Hull, *Impeachment in America, 1635-1805*, at 78-95, 116-45, 164-77 (1984).

In the face of this evidence, trial by committee cannot be upheld on the theory that the Framers intended such trials to be allowed "greater procedural flexibility" than in the criminal context. The question here is not whether or by how much the impeachment trial should resemble a criminal proceeding. The question is whether the Constitution specifically requires that there be an impeachment trial by the Senate. Nor is the committee procedure authorized by the apparent use of committees to conduct evidentiary proceedings in certain English impeachments in the early 1600's. If the Framers had wished impeachment trials to be by committee, surely they would have said so, or their contemporaries would have done so in the first impeachments. Instead, the Framers prescribed a formal and deliberate impeachment trial, and they specifically rejected a proposal that would permit the removal of judges upon a majority vote by the legislature. *See supra* at 22. Thus it should not be surprising that impeachment trial by committee, to the extent such a procedure may have been used in England in the early Seventeenth Century, was not accepted in this country.

Ultimately, Judge Edwards resorted to "common sense" reasoning to justify his conclusion: if the Senate could try petitioner on the Senate floor with less than twelve Senators present, he contended, then surely it should be able to "try" petitioner by committee. Pet. App. A, at 56a-57a. But that argument rests on a false premise; the Constitution expressly requires the presence of a quorum of the Senate, now 51 members, for the Senate to conduct its business. Art. I, § 5, cl. 1. And the point is also of no constitutional significance. Whether some individual Senators might fail to attend trial proceedings conducted on the Senate floor cannot legitimate a committee procedure that conflicts with the express command of the Constitution.

C. Impeachment Trial by Committee Is Inherently Unfair

The committee trial procedure is inherently and demonstrably unfair to the accused—a fact confirmed by the voting patterns in the Claiborne, Hastings, and Nixon impeachments. *See supra* at 7-8; Appendix H. Of the ten impeachment articles on which Judges Hastings and Nixon were convicted, nine failed to attract a two-thirds majority of the committee members. Pet. App. B, at 62a.

The reasons for this bias are plain. First, credibility issues lay at the heart of the case here. But credibility issues cannot responsibly be decided by a jury that never hears or sees the witnesses.[10] Nor is a committee summary of the evidence an adequate substitute for hearing and seeing the witnesses, even assuming such a summary is read. *Cf.* Pet. App. B, at 60a. In this case, the Senate Committee report omitted important passages of Nixon's trial testimony and inaccurately reported that Nixon's Senate testimony "contrasted" with his trial testimony. *See supra* at 6. These errors would not have occurred had petitioner's impeachment trial been conducted before the Senate as required by the Constitution.

In cases in which a criminal conviction precedes impeachment trial, moreover, those Senators not on the impeachment committee inevitably will defer to the jury verdict in reaching their decisions. In this case, Senator Levin stated as much:

> Would we be here but for Judge Nixon's conviction? I doubt it, since there is a reasonably supportable, benign explanation of his testimony before the grand jury. But . . . Judge Nixon was

[10] A number of Senators have criticized the committee trial procedure for this reason. *See, e.g.*, 132 Cong. Rec. S16823 (daily ed. Oct. 16, 1986) (remarks of Sen. Levin regarding Claiborne impeachment); *id.* at S15762 (remarks of Sen. Bingaman regarding Claiborne impeachment); *id.* at S16821 (remarks of Sen. Evans regarding Claiborne impeachment).

> convicted of perjury based on the very same statements before us in this impeachment proceeding. . . . The practice of factfinders relying on findings made in other legal proceedings is called collateral estoppel and is a long-standing well-established principle of American law. I believe it is particularly appropriate for us to use that doctrine in the matter of Judge Nixon, *because of the Senate's refusal to allow him to conduct any impeachment trial before the full Senate. Because most of us were not members of the Senate committee that heard the evidence in this matter and were not present to evaluate the demeanor of the witnesses, we are at a disadvantage in making the factual findings required by this proceeding.*

Imp. Rec., Proceedings at 444-45 (emphasis added).

Such deference to prior criminal proceedings directly undercuts the design of the Constitution in providing an impeachment trial separate from the criminal trial. Impeachment becomes easy, judicial independence is sapped, and the constitutional balance of power is changed forever. Instead of the cumbersome, deliberate process prescribed in the Impeachment Clause, trial by committee results in a process that closely resembles John Dickinson's rejected proposal that judges be removed by "address," through legislative vote without a trial. *See supra* at 22. For the eighty-eight Senators who never heard or saw the trial, Nixon's removal from office thus effectively was achieved by a procedure rejected by the Framers. This Court cannot ignore this rewriting of the Constitution by the Senate.

CONCLUSION

For all of the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the questions raised in this petition.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5246

WALTER L. NIXON, JR.,
Appellant,

v.

UNITED STATES OF AMERICA, *et al.*

Appeal from the United States District Court
for the District of Columbia

Argued March 14, 1991

Decided July 9, 1991

Before EDWARDS, WILLIAMS and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

Concurring opinion filed by Circuit Judge RANDOLPH.

Opinion dissenting in part and concurring in the judgment filed by Circuit Judge HARRY T. EDWARDS.

STEPHEN F. WILLIAMS, Circuit Judge:

Walter L. Nixon, Jr., formerly the Chief Judge of the U.S. District Court for the Southern District of Mis-

sissippi, was impeached by the House of Representatives and convicted by the Senate for giving false testimony to a grand jury investigating allegations that he had been bribed. Nixon seeks judicial review of the Senate's procedures—in particular, its use of a committee to take testimony and gather other evidence.

The Constitutional Convention, however, gave the Senate "the *sole* Power to try all Impeachments", Art. I, § 3, cl. 6 (emphasis added). It not only rejected proposals to assign the power to the federal courts, but it did so for reasons that are almost impossible to square with any judicial role in the process. We find Nixon's claim nonjusticiable.

* * *

After an investigation into reports that Nixon had asked a local district attorney to stop the prosecution of a man whose father had enriched Nixon through an investment scheme, a grand jury indicted Nixon on one count of receiving an illegal gratuity and three counts of perjury before the grand jury. At trial, Nixon was convicted on two counts of perjury and acquitted on the other two counts. He was sentenced to prison, and his conviction was affirmed on appeal. See *United States v. Nixon*, 816 F.2d 1022 (5th Cir. 1987); see also *United States v. Nixon*, 881 F.2d 1305 (5th Cir. 1989) (affirming the denial of Nixon's motion for a new trial).

Even after this conviction, Walter Nixon refused to resign from his office as a United States district judge, and while serving time in prison he continued to draw his judicial salary. See H.R. Rep. No. 36, 101st Cong., 1st Sess. 13 (1989). The House of Representatives began impeachment proceedings, see *id.*, and on May 10, 1989, it voted to impeach Nixon on three articles charging him with giving false testimony to the grand jury and bringing disrepute on the federal judiciary. See 135 Cong. Rec. H1811 (daily ed. May 10, 1989).

When these articles of impeachment were presented to the Senate, it invoked its own Impeachment Rule XI, under which the presiding officer appoints a committee of twelve senators "to receive evidence and take testimony". S. Imp. R. XI, *reprinted in* Senate Manual, S. Doc. No. 1, 101st Cong., 1st Sess. 186 (1989); see S. Res. 128, 101st Cong., 1st Sess., 135 Cong. Rec. S5199 (daily ed. May 11, 1989). The committee conducted four days of hearings, taking live testimony from ten witnesses, including Nixon himself. See S. Rep. No. 164, 101st Cong., 1st Sess. 4 (1989). It then transmitted to the full Senate a complete record of the evidence and a report, summarizing both the undisputed and disputed facts of the case without resolving contested issues or recommending any particular disposition of the charges. See *id.* at 3-4. After considering final briefs, hearing arguments on the Senate floor from both the impeachment managers and the defense, including a personal appeal from Nixon himself, and posing questions to the parties, see 135 Cong. Rec. S14,493-517 (daily ed. Nov. 1, 1989), the Senate voted by more than the constitutionally prescribed two-thirds majority to convict Nixon on two of the three articles. 135 Cong. Rec. S14,635 (daily ed. Nov. 3, 1989); see Art. I, § 3, cl. 6. The presiding officer entered judgment removing him from his office as a United States district judge. 135 Cong. Rec. at S14,636.

Nixon then sued in district court, arguing that the Senate's failure to give him a full evidentiary hearing before the entire Senate violated its constitutional duty to "try" all impeachments. See Art. I, § 3, cl. 6. He sought a declaratory judgment that his conviction by the Senate was void and that his judicial salary and privileges should be reinstated from the date of his conviction. The district court held that his claim was nonjusticiable, see *Nixon v. United States*, 744 F. Supp. 9 (D.D.C. 1990), and we agree.

* * *

"The House . . . shall have the sole Power of Impeachment", Art. I, § 2, cl. 5, and "The Senate shall have the sole Power to try all Impeachments", Art. I, § 3, cl. 6. Nowhere else does the Constitution explicitly confer on a body the "sole" power to do anything. The only court to fully consider the issue before this case gave "sole" its full weight. It read the word to express an "intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment." *Ritter v. United States*, 84 Ct.Cl. 293, 296 (1936). The court went on:

> The dictionary definition of the word "sole" is "being or acting without another" and we think it was intended that the Senate should act without any other tribunal having anything to do with the case. This would be the ordinary signification of the words and this construction is supported by a consideration of the proceedings of the Constitutional Convention and the uniform opinion of the authorities which have considered this matter.

Id. Indeed, the unanimous rejection of judicial review to which the court refers seems not to have been breached until Raoul Berger 20 years ago used a rather casual reading of *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), to claim the availability of judicial review. See Raoul Berger, Impeachment: The Constitutional Problems (1973); Staff of Senate Comm. on Rules and Administration, 93d Cong., 2d Sess., Impeachment: Miscellaneous Documents 170-71 (1974) ("Committee Print") (memorandum on judicial review of impeachment proceedings by Stephen F. Goldstein).

The history of the Constitution's impeachment provisions bears out *Ritter*'s understanding. Both of the broad proposals that provided the foundation for the Convention delegates' debates, Randolph's "Virginia Plan" and Paterson's "New Jersey Plan", gave the power to "hear and determine" impeachments to the federal judiciary.

See 1 The Records of the Federal Convention of 1787, at 21-22 (Max Farrand ed. 1966) (Virginia Plan); *id.* at 244 (New Jersey Plan); see also P. Hoffer & N. Hull, Impeachment in America, 1635-1805, at 97-100 (1984). Madison supported this assignment, specifically favoring the Supreme Court, see 2 Farrand at 551, while Hamilton proposed a special court composed of the chief judge from each state's supreme court, see 1 Farrand at 292-93. However, once the Convention decided that a college of electors, rather than the Senate, should name the President, thereby eliminating a potential conflict between the Senate's roles as both selector and remover of the President, it authorized the Senate to conduct impeachment trials and to render final judgments by two-thirds vote. Hoffer & Hull at 98-99; 2 Farrand at 500-01, 552-53.

In the surviving scraps of Convention debate on the issue, the focus was on presidential impeachment. While both Madison and Pinckney opposed use of the Senate, as tending to increase executive dependence on the legislative branch, Gouverneur Morris responded that the Supreme Court was "too few in number and might be warped or corrupted", and Roger Sherman suggested that the Court was an improper forum to try the President "because the Judges would be appointed by him." 2 Farrand at 551. These themes of conflict of interest—so typical of the framers' concern over checks and balances—persisted into later discussions of applying the impeachment power to judges.

In The Federalist, Hamilton identified the impeachment power as *the* basis for constraining usurpation by judges. Thus, in Federalist No. 79 he wrote:

> The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and

> disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.

The Federalist 532-33 (Jacob E. Cooke ed. 1961). A little later, though generally disparaging the risk of judicial aggrandizement as a mere "phantom", he went on again to identify impeachment as "the important constitutional check" and to justify the assignment to the Senate as a key assurance of the remedy's adequacy:

> And the inference [that usurpations were improbable] is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments, in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords at the same time a cogent argument for constituting the senate a court for the trial of impeachments.

Federalist No. 81, Cooke ed. at 545-46. Hamilton's emphatic language would have fallen rather flat if candor had compelled him to add that, of course, the judges themselves would sit in final judgment over this check on their excesses.

The framers invoked an additional kind of conflict or bias to support use of the Senate rather than the judiciary for impeachment trials—the bias caused by a per-

son's having played a role in a prior phase of an extended process. Article I specifies that a person convicted in impeachment proceedings "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Art. I, § 3, cl. 7. Thus the Constitution explicitly anticipates two sets of proceedings for at least some officials who commit impeachable offenses—one in Congress and one in the courts. The Framers separated the two, trying to secure for the accused the benefit of independent judgments. Though Hamilton assumed (in line with other delegates' comments) that impeachment trials would precede criminal trials, his insistence on the need for distinct, independent forums is no less compelling when the sequence is reversed, as was true of Nixon:

> Would it be proper that the persons, who had disposed of his fame and his most valuable rights as a citizen in one trial, should in another trial, for the same offence, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights, which might be brought to vary the complexion of another decision?

Federalist No. 65, Cooke ed. at 442.

The risks from overlapping powers reach their apogee in a presidential impeachment trial, for which the Chief Justice presides over the Senate. Art. I, § 3, cl. 6. Whether the Chief Justice has clashed with the Senate over trial procedures, as did Chief Justice Chase during the trial of President Andrew Johnson, see Berger at 268-69; Committee Print at 6-8, or concurred all the way, he would be seen as prejudiced in review of the impeachment trial. That no one recognized this conflict in the framing and ratification debates argues the implausibility of such review.

That the Convention intended the impeachment power to be qualified only by political forces is also reflected in constitutional language limiting the executive's authority. Just as Hamilton viewed impeachment as "the important contitutional check" on the judiciary (Federalist No. 81), he called the power "an essential check in the hands of [the legislative body] upon the encroachments of the executive". Federalist No. 66, Cooke ed. at 446; see also Federalist No. 65, Cooke ed. at 441 (describing impeachments as "a bridle in the hands of the legislative body upon the executive servants of the government"). The delegates made sure that the executive would have no power to undermine the check when they expressly excepted impeachments from the President's pardon power. Art. II, § 2, cl. 1. While the absence of any such express limitation on judicial interference might support an "expressio unius" argument in favor of judicial review, a more plausible reading is that the framers simply assumed that courts had nothing whatever to do with impeachments.

If the Constitution's text, backed by the historical evidence, prevents both the judiciary and the executive from constraining the legislative power of impeachment, did the framers just slip up, leaving an unchecked check? The answer can be found in Article I itself, which provides two safeguards *within* the legislative branch to control unwarranted use of impeachments: (1) the separation of impeachment powers between the House and the Senate, see Art. I, § 2, cl. 5; § 3, cl. 6, and (2) the requirement of a two-thirds vote in the Senate to convict, see Art. I, § 3, cl. 6. Hamilton's response to fears of abuse, including concerns about mixing judicial and legislative power in one body, tracked the two limits found in Article I. First he argued that the division of the impeachment powers "guards against the danger of persecution from the prevalency of a factious spirit in either of [the two houses]." Federalist No. 66, Cooke ed. at 446. Then he

concluded, "As the concurrence of two-thirds of the senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire." *Id.*

For Hamilton, that was enough. He made no reference to judicial review as a check of the power, in sharp contrast with his discussion of ordinary legislative powers. Compare Federalist No. 78, Cooke ed. at 524-25 (judicial review as a check on unconstitutional bills of attainder, ex post facto laws, and statutes). In fact, the parties have not identified a single statement in either the framers' or ratifiers' debates alluding even to the possibility of judicial review, and Berger, its ardent proponent, acknowledges the absence of any such mention at the state conventions. See Berger at 116. To check the impeachment power, the framers quite naturally relied on the political accountability of members of Congress. Thus judges, who on so many issues have the last word, must rely on the public as the ultimate check on impeachment, itself the Constitution's explicit check on their own excesses.

The broad scope of the Senate's power is further supported by the grant to each house of the power to "determine the Rules of its Proceedings". Art. I, § 5, cl. 2. This clause gives the Senate independent discretion to set procedural rules for impeachment trials, including the rule challenged by Nixon—Senate Impeachment Rule XI. The Supreme Court hinted, in a case where it refused to second-guess the House's rule on establishing the presence of a quorum, that congressional rules of procedure may be judicially reviewable in some circumstances if they "ignore constitutional restraints", see *United States v. Ballin*, 144 U.S. 1, 5, 12 S.Ct. 507, 509, 36 L.Ed. 321 (1892), but this court has refused (on prudential grounds) to review the House of Representative's rules allocating seats on committees, despite a claim that those rules violated the Fifth Amendment rights of members

of the minority party in the House. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C.Cir.1983). The rules clause provides at least indirect support for the view that the Senate's "sole Power to try all Impeachments" includes the sole power to frame the rules it will follow in conducting such trials.

Constitutional exclusion of judicial review of impeachments would seem to be the end of the matter. But courts have long analyzed the justiciability of issues constitutionally committed to the other branches as part of the "political question" doctrine. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164, 2 L.Ed. 60 (1803). If the Constitution makes a "textually demonstrable commitment" of *any* issue to "a coordinate political department", see *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962), it so commits the conduct of impeachment trials to the Senate. It remains to consider whether *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), and later cases, have so shrunk the political question doctrine as to permit courts to set the boundaries of permissible impeachment trial procedure despite such a textual commitment. A careful reading of *Powell*, which explictly preserved the political question doctrine, see *id.* at 518, 89 S.Ct. at 1962 ("It is well established that the federal courts will not adjudicate political questions"), suggests the contrary.

Powell concerned the interplay between three constitutional clauses: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members" (Art. I, § 5, cl. 1); the qualifications for Representatives specified in Art. I, § 2, cl. 2; and the expulsion clause (Art. I, § 5, cl. 2). The Court embarked on its constitutional analysis of justiciability with the point that "[i]n order to determine whether there has been a textual commitment to a co-ordinate department of the Government, we must interpret the Constitution." 395 U.S. at 519, 89 S.Ct. at 1963. The Court then examined the text

and history of Art. I, § 5 to determine whether the framers limited the scope of the textual commitment found in that clause by other constitutional provisions. It found such limits in Art. I, § 2's narrow list of qualifications (age, period of citizenship of the United States, and residence when elected). See *id.* at 520-21, 89 S.Ct. at 1963-64. The Court found its reading of the qualifications and exclusion clauses confirmed by the expulsion clause's requirement of a two-thirds vote, which would be wholly undercut by giving an unrestricted meaning to the exclusion clause. *Id.* at 547-48, 89 S.Ct. at 1977-78.

The Court's political question analysis in *Powell* thus relies heavily on the ultimate conclusion that it was the framers' intention "to deny either branch of Congress the authority to add to or otherwise vary the membership qualificaitons *expressly set forth in the Constitution.*" *Id.* at 532, 89 S.Ct. at 1969-70 (emphasis added); see also *id.* at 540, 89 S.Ct. at 1973-74 ("The debates at the state conventions also demonstrate the Framers' understanding that the qualifications for members of Congress had been fixed *in the Constitution.*") (emphasis added). The Court emphasized as a key piece of evidence this quotation from Federalist No. 60: "The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the constitution; and are *unalterable by the legislature.*" Cooke ed. at 409 (emphasis added), *quoted in Powell*, 395 U.S. at 539, 89 S.Ct. at 1973. The Federalist yields no parallel suggestion that the minimum procedures for conducting an impeachment trial are unalterable by the legislature and thus not textually committed. Thus application of *Powell's* method—an analysis of the relevant constitutional text and history—leads to a conclusion of nonjusticiability.

Later cases confirm this understanding of *Powell.* In *Roudebush v. Hartke*, 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972), the Supreme Court decided that a

state's recount of ballots in a senatorial election did not infringe on the Senate's power to "be the Judge of the Elections . . . of its own members", Art. I, § 5, cl. 1, as the recount could "usurp" the Senate's function "only if it frustrate[d] the Senate's ability to make an independent final judgment", 405 U.S. at 25, 92 S.Ct. at 810-11, which it could not do, *id.* at 25-26, 92 S.Ct. at 810-11. While the wording of the holding itself carries an implication of nonjusticiability, the Court was more explicit in its rejection of a claim that the candidate's action had been mooted by the Senate's decision to seat one of the candidates, subject to the outcome of the case before the Court. It stated that it was "without power to alter the Senate's judgment", *id.* at 18-19, 92 S.Ct. at 807-08,[1] and that "[w]hich candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question", *id.* at 19, 92 S.Ct. at 807-08 (citing *Powell*). The Court decided that the case was not moot because the Senate had seated the other candidate only temporarily until the conclusion of the suit, after which it would "be free to make an *unconditional* and *final* judgment under Art. 1, § 5." *Id.* (emphasis added). This strong language indicates that the Court would find nonjusticiable any challenge to the Senate's "final" judgment in a disputed election, even a procedural challenge that alleged, for example, that the senators refused to hear critical witnesses on the validity of disputed ballots.

Since *Powell* and *Roudebush*, this court has refused to entertain objections not only to the substance but also to the *procedures* used by the House of Representatives in

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[1] The Court appended the following footnote:

> 6. See *Reed v. County Comm'rs*, 277 U.S. 376, 388, 48 S.Ct. 531, 532, 72 L.Ed. 924 (1928): "[The Senate] is the judge of the elections, returns and qualifications of its members. Art. I, § 5. It is fully empowered and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department."

Id. at 19 n. 6, 92 S.Ct. at 807 n. 6.

the exercise of its ballot-counting authority under Art. I, § 5, cl. 1 (each house "shall be the Judge of the Elections, Returns and Qualifications of its own Members"). In *Morgan v. United States*, 801 F.2d 445 (D.C.Cir.1986), a unanimous panel examined the text and history of the clause, noting especially that although it was attacked in the ratification debates, none of its defenders "mention[ed] the safeguard of judicial review. Such a safeguard was evidently unthinkable, since the determination of the legislative House was *itself* deemed to be a *judicial* one." 801 F.2d at 447 (emphasis in original). The point applies with equal force here. We concluded that "[t]he exclusion of others—and in particular of others who are judges—could not be more evident." *Id.*; see also *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985) ("The House is not only 'Judge' but also final arbiter. Its decisions about which ballots count, and who won, are not reviewable in any court. . . .").

In *Morgan* we quite literally underscored that the elections clause makes each House "*the* Judge" of elections. 801 F.2d at 447 (emphasis in original opinion). If language making each house "the judge" of elections gives that house exclusive discretion to determine the procedures for making that judgment, it seems *a fortiori* that a clause granting the Senate "*the sole Power* to try all Impeachments" gives it sole discretion to choose its procedures. If the clause made the Senate "the sole trier of impeachments" the structure would be more parallel but the grant of exclusive authority no clearer.

Although the primary reason for invoking the political question doctrine in our case is the textual commitment of impeachment trials to the Senate, the need for finality also demands it. See *Baker v. Carr*, 369 U.S. at 210, 82 S.Ct. at 706. In the elections clause context, the *Morgan* court emphasized the need for "quick, decisive resolution of election controversies." *Morgan*, 801 F.2d at 450. The need for finality in impeachments is even more acute. If claims such as Nixon's were justiciable, procedural ap-

peals from every impeachment trial would become routine, as the Court of Claims observed even in the less litigious era of the *Ritter* decision. See 84 Ct.Cl. at 299. For the impeachments that are anything but routine, those of presidents and chief justices, the intrusion of the courts would expose the political life of the country to months, or perhaps years, of chaos. Even if the courts qualified a finding of justiciability with a rule against stays or specific relief of any kind, their review would undermine the new President's or Chief Justice's legitimacy for at least as long as the process took. And a declaratory action *without* final relief awarding the office to one person or the other could confound matters indefinitely.

If the political question doctrine has no force where the Constitution has explicitly committed a power to a coordinate branch and where the need for finality is extreme, then it is surely dead. But although the Supreme Court has rarely applied the doctrine in recent years, see Dissent at 258 & n. 11, it has also declined the several opportunities available to dispatch it. See *Gilligan v. Morgan*, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973); *Roudebush v. Hartke*, 405 U.S. 15, 19, 92 S.Ct. 804, 807-08, 31 L.Ed.2d 1 (1972); *Powell*, 395 U.S. at 518, 89 S.Ct. at 1962. We honor the doctrine and apply it here.

* * *

It does not help establish justiciability to pose hypotheticals of outrageous behavior by a coordinate branch, such as that the Senate might turn its impeachment trial responsibilities over "to a randomly chosen group of schoolchildren", Dissent at 23, or even pass a rule "allowing conviction and removal of impeached officers by a majority vote", *id.* at 17. If the Senate should ever be ready to abdicate its responsibilities to schoolchildren, or, moved by Caligula's appointment of his horse as senator, to an elephant from the National Zoo, the republic will

have sunk to depths from which no court could rescue it. And if the senators try to ignore the clear requirement of a two-thirds vote for conviction, they will have to contend with public outrage that will ultimately impose its sanction at the ballot box.[2] Absent judicial review, the Senate takes sole responsibility for its impeachment procedures as a full-fledged constitutional actor, just as the framers intended.

It would be peculiarly ironic for the judiciary to take charge of defining the limits of permissible procedure out of concern over the Senate's possible excesses. The exercise of *any* final power is by definition open to monstrous hypothetical abuse. But judges exercise such power daily, unreviewably imposing procedural and substantive boundaries on almost every decision of the political branches. In all this we are free of political constraints, subject to correction solely by constitutional amendment and to sanction solely by impeachment. If the impeachment claims of a fellow judge were justiciable, the circle would be closed —the judiciary would have final, unreviewable power over the one procedure established to restrain excesses in all its other final and unreviewable powers: checkmate.

Today we refuse to embark on setting limits for the procedures the Senate may choose for the trial of impeachments; the Constitution excludes us. Walter Nixon's claim is not justiciable.[3]

Affirmed.

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[2] Because the two-thirds vote requirement of Art. I, § 3, cl. 6 is so concrete, the argument that it serves as an unalterable limit on the textual commitment of impeachments, with judicial review available for at least some claims of Senate disregard, is far more plausible under *Powell* than Nixon's effort to find justiciable limits in the word "try." However, we need not decide this issue, so we leave it for the unlikely day of its arising.

[3] Because Nixon's claim is nonjusticiable, we need not address appellees' argument that Nixon should have sued in Claims Court rather than district court.

RANDOLPH, Circuit Judge, concurring:

We are in agreement that, "political question" or not, we must interpret the clause giving the Senate the "sole Power to try all Impeachments," U.S. CONST., art. I, § 3, cl. 6. My review of that clause leads me to conclude that the Senate, and the Senate alone, is to choose the method by which it exercises its "sole Power." The controlling question, it seems to me, is not whether the Senate acted in conformity with the historical understanding of the word "try," or even whether the word has a sufficiently concrete meaning to constitute a limitation on the Senate's power. It is whether the judiciary is to make those judgments.

The "sole Power to try all Impeachments" must include the sole power to set the procedures for trial, as the Senate did here. The Constitution names no other body to perform that function. Apart from the requirements that the Senators take an oath, that the Chief Justice preside over impeachments of Presidents, and that two thirds of the Senators present must concur, the Constitution is silent about other procedural details. If the Senate did not have the sole power to determine how to conduct the proceedings, if the judiciary had the final say on what procedures the Senate must put in place, it is only a short step to judicial review of the Senate's compliance with those procedures. Once that dike bursts, there can be no holding back the flood of issues that inevitably will be presented to the courts. One impeached official will claim as fundamental to a "trial" the right to an unbiased tribunal, free of undue political influence. Another will argue that notice was inadequate or that his right to call witnesses was impaired. Others will contend that their impeachments must be set aside because they were denied an adequate opportunity to cross-examine witnesess, or because improper evidence was introduced against them, or because some Senator made a prejudicial remark during the proceedings. "Procedural"

challenges of this sort fill the pages of the federal reports. There is no reason to doubt that impeached individuals would be less vigorous litigators or that, over time, judicial review would lead to judicial control. Yet as Judge Williams ably demonstrates, the Framers did not intend the judiciary to perform such a reviewing function in impeachment trials. The Constitutional Convention removed impeachment from the Supreme Court's original jurisdiction and transferred the power to try impeachments to the Senate. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 186, 473, 493, 552-53, 592, 600-01 (M. Farrand ed. 1966). Both the Virginia and the New Jersey plans proposed entrusting judges with the power of impeachment, but the Framers considered it wiser to assign this function to the Senate. *See* 1 Farand at 21-22, 244; 2 Farrand at 500-01 & 552-53; P. HOFFER & N. HULL, IMPEACHMENT IN AMERICA, 1635-1805, at 97-100 (1984). Although Madison favored giving the Supreme Court the power of impeachment, the Convention delegates rejected the idea. *See* 2 Farrand at 551. Whatever the precise rationale for this, concerns about the allocation of power were undoubtedly at work. Alexander Hamilton noted that the possibility of judicial usurpation of legislative power "affords . . . a cogent argument for constituting the Senate a court for the trial of impeachments." THE FEDERALIST NO. 81, at 546 (A. Hamilton) (J. Cooke ed.).

I hesitate to frame my conclusion that the Senate alone is to decide how to conduct impeachment trials in terms of the "political question" doctrine. I might have no difficulty doing so if the phrase simply meant that "the Constitution has committed the determination of the issue to another agency of government than the courts" (Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV.L.REV. 1, 9 (1959)). *Powell v. McCormack*, 395 U.S. 486, 518, 89 S.Ct. 1944, 1962, 23 L.Ed.2d 491 (1969), and *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962), do begin by ask-

ing whether there has been a "textually demonstrable constitutional commitment of the issue to a coordinate branch of government." But in *Powell*, 395 U.S. at 521, 89 S.Ct. at 1963-64, the Court proceeded to answer a quite different question—"whether the 'qualifications' which Article I, Section 5 authorized the House to 'judge' were only those specified in Article I, Section 2 (and perhaps elsewhere in the Constitution)." Sandalow, *Comemnts on Powell v. McCormack*, 17 UCLA L. REV. 164, 172-73 (1969). Judge Edwards follows an analogous route. He believes that because the Senate's power is to "try" impeachments, the judiciary must first give content to the word "try" and then decide whether the Senate has exceeded that power. His approach ultimately leads to conferring on the courts a rather large role in impeachments although the Framers intentionally excluded the judiciary. As I have stated, I view the controlling question as the judiciary can pass upon the validity of Senate's procedural decisions. My conclusion that the courts have no such role to play in the impeachment process ultimately rests on my interpretation of the Constitution. Perhaps the case qualifies as one presenting a "political question" within *Powell*'s meaning, perhaps not. It surely differs from *Powell* in one respect. In *Powell*, at least, another provision of the Constitution defined "Qualifications"; the same cannot be said for the word "try." At all events, I see no need to rely on the somewhat "amorphous" doctrine of "political question[s]." *Morgan v. United States*, 801 F.2d 445, 447 (D.C.Cir. 1986) (Scalia, J.), *cert. denied*, 480 U.S. 911, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987).

HARRY T. EDWARDS, Circuit Judge, dissenting in part and concurring in the judgment:

In this case, Walter L. Nixon, Jr., a former United States District Judge, challenges the constitutionality of his conviction by the United States Senate on two articles of impeachment and his subsequent removal from

the bench. Nixon contends that the Senate violated its express constitutional duty to "try" his impeachment by delegating most of the actual trial work to a special committee of 12 senators. The District Court found that Nixon had presented a significant constitutional question but that it was nonjusticiable under the political question doctrine. *See Nixon v. United States*, 744 F.Supp. 9, 13 (D.D.C. 1990).

I find that Nixon's claim is justiciable. Because Nixon alleges that the Senate violated an express textual limitation on its constitutional authority—that is, convicted him on articles of impeachment without first "try[ing]" him within the constitutional meaning of that term—the courts are not only competent, but duty-bound, to interpret the text and decide the constitutional question. *See Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). Reaching the merits, however, I conclude that the Senate's use of a special committee to hear witnesses and gather evidence did not deprive Nixon of any constitutionally protected right. I would therefore affirm the judgment of the District Court, albeit on different grounds than those enunciated by the trial court or by the majority today.

I. Background

In early 1984, the Federal Bureau of Investigation ("FBI"), acting on tips, commenced an investigation of Walter L. Nixon, Jr., who was then Chief Judge of the U.S. District Court for the Southern District of Mississippi. The FBI was given reason to believe that, in consideration of certain financial inducements, Nixon had communicated with a local prosecutor on behalf of a friend's son who was facing possible drug charges. Following the FBI investigation, the case was presented to a grand jury, before whom Nixon testified. In his testimony to the grand jury, Nixon falsely denied ever having spoken with the local prosecutor about the drug prosecution. The grand jury then returned an indictment charg-

ing Nixon with one count of bribery and three counts of perjury. In 1986, although acquitted on the underlying bribery charge, Nixon was convicted of perjury based on his grand jury testimony, and his conviction was subsequently affirmed. *See United States v. Nixon*, 816 F.2d 1022 (5th Cir.1987), *cert. denied*, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988).

In May 1989, the House of Representatives voted to impeach Nixon on three articles relating to his perjury. *See* 135 CONG. REC. H1811 (daily ed. May 10, 1989). The first two articles charged Nixon with giving false testimony to the grand jury and the last charged him with bringing disrepute to the federal judiciary by way of his actions. *See id.* at H1802-03.

When these articles came before the Senate for trial, the Senate voted to empanel a special committee of 12 senators to hear witnesses and gather evidence. *See* S.Res. 128, 101st Cong., 1st Sess., 135 CONG. REC. S5199 (daily ed. May 11, 1989). This committee was established pursuant to Senate Impeachment Rule XI, an internal rule adopted in 1935 and first invoked in 1986 during the impeachment trial of former U.S. District Judge Harry Claiborne. Under Rule XI, the Senate may elect to delegate certain evidence-gathering responsibilities associated with an impeachment trial to a special 12-member committee, in lieu of conducting a full evidentiary hearing on the Senate floor. Although the rule does not prohibit it, in practice the committee has not been empowered to pass judgment on contested issues of fact or make any recommendations concerning the resolution of the impeachment charges. *See* S.Res. 128, *supra*, § 5. The committee is, however, fully authorized to hear witnesses, permit cross-examination and compile a record upon which the full Senate may act.[1]

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[1] Rule XI provides:

> [I]n the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee

Under established procedures, all members of the Senate are kept fully apprised of the committee's proceedings. The proceedings are broadcast live to all Senate offices and are also recorded on videotape which is made available to all senators. The committee also prepares a report summarizing both the undisputed facts of the case and the evidence relating to those which are contested. This report, along with a transcript of the committee's proceedings, is then passed along to the full Senate. Rule XI does not preclude the Senate from calling witnesses before the full body or from conducting further factual inquiries on the Senate floor. Prior to a final vote, the parties are permitted to make arguments before the full assembly.

Nixon protested the use of an evidentiary committee in his case and twice unsuccessfully asked the Senate

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of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

S.IMP.R. XI, *reprinted in* SENATE MANUAL, S.Doc. No. 1, 98th Cong., 2d Sess. 174 (1984).

to conduct all evidentiary proceedings on the Senate floor. The committee appointed to inquire into Nixon's case conducted four days of hearings in September 1989 and heard from 10 witnesses, including five defense witnesses and Nixon himself. *See* REPORT OF THE IMPEACHMENT TRIAL COMMITTEE ON THE ARTICLES AGAINST JUDGE WALTER L. NIXON, JR., S.REP. NO. 164, 101st Cong., 1st Sess. 4 (1989). On October 16, 1989, the committee submitted its report to the full Senate, *see id.*, and the parties submitted final briefs shortly thereafter.

For three consecutive days, beginning November 1, 1989, the full Senate considered the question of Nixon's impeachment. On November 1, Nixon and the House impeachment managers were each allowed 90 minutes to present closing arguments on the Senate floor. *See* 135 CONG. REC. S14,494 (daily ed. Nov. 1, 1989). Nixon himself used some of that time to offer a personal appeal to the senators. *See id.* at S14,502-04. Following these arguments, the senators posed a number of written questions to the parties. *See id.* at S14,513-16. On November 2, the full Senate deliberated on Nixon's guilt for six hours in closed session. On the final day, the Senate voted by the necessary two-thirds majority to convict Nixon on two of the three articles of impeachment.[2]

Nixon now challenges the constitutionality of the procedure used by the Senate in considering his impeachment. His argument is that the Constitution obligates "the Senate" to "try" impeachments and that this language entitles him to a full evidentiary hearing *on the floor of the Senate*. The Senate's use of a committee to gather evidence and hear witnesses, Nixon argues, fundamentally prejudiced his case and stripped the Senate's later de-

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[2] The Senate voted 89-to-8 to convict Nixon on Article I and 78-to-19 to convict on Article II. *See* 135 CONG.REC. S14,635 (daily ed. Nov. 3, 1989). Fifty-seven senators also voted to convict Nixon on Article III, *see id.* at S14,636, although this fell short of the two-thirds majority required by the Constitution, *see* U.S. CONST. art. I, § 3, cl. 6.

liberations of the judicial character required by the Constitution. In particular, Nixon contends that, although issues of credibility were central to the Senate's ultimate disposition of his case, only the 12 senators who served on the committee actually heard the witnesses testify in person. As evidence of the prejudice he suffered, Nixon offers an analysis of the final vote in his case which shows that senators who did not serve on the committee (and thus did not hear the witness testimony first-hand) were more likely to vote to convict than those senators who sat on the committee.[3]

Nixon first brought this challenge before the District Court in June 1989, when he intervened in a law suit brought by then-Judge Alcee Hastings, who was also facing impeachment proceedings. In that case, the District Court held Nixon's claim to be a nonjusticiable political question; this court affirmed the trial court's dismissal, but on the grounds that the claims were then premature in light of the fact that neither plaintiff had yet been convicted by the Senate. *See Hastings v. United States Senate*, 716 F.Supp. 38, 40 (D.D.C.), *aff'd mem. on other grounds*, 887 F.2d 332 (D.C.Cir.1989) (text of unpublished memorandum decision available on Westlaw).

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[3] On Article I, nine out of the 12 senators who served on the impeachment committee (75%) voted to convict, while fully 94% of senators off the committee favored conviction. On Article II, 58% of the committee members voted for conviction, compared to 84% of the remaining senators. On Article III, 42% of committee members, and 61% of the remaining senators, voted to convict. *See* Joint Appendix Tab 4.

This voting pattern has occurred in all three impeachments in which the Senate has used a committee to gather evidence—the impeachments of U.S. District Judges Claiborne, Alcee L. Hastings and Nixon. Aggregating all votes, senators who did not sit on the evidentiary comimttee favored conviction by almost a three-to-one margin, while those who served on the committee favored conviction by only a bare majority. *See* Brief of Appellant, Table 1, at 16 (senators not on the committee voted 71% of the time to convict; senators on the committee voted 53% of the time to convict).

Following the Senate's vote, Nixon renewed his constitutional challenge, seeking a declaration that his conviction by the Senate and subsequent removal were unconstitutional. In reply, the Government mounted a two-prong attack on the court's authority to hear Nixon's challenge. First, the Government renewed its insistence that the claim was a nonjusticiable political question. Second, it asserted that, even if the claim were justiciable, it could be heard only in the United States Claims Court, the exclusive forum in which the United States has waived its sovereign immunity to suits for large money damages. Because a finding in Nixon's favor on the merits might entitle him to back pay in excess of $10,000, the Government reasoned, Nixon's suit was essentially one for money damages over which the Claims Court would have exclusive jurisdiction.

The District Court held that it had proper subject-matter jurisdiction over Nixon's suit but concluded, once again, that his claim was nonjusticiable under the political question doctrine. *See Nixon v. United States*, 744 F.Supp. 9, 13-14 (D.D.C.1990). In the District Court's view, the Senate's use of an evidentiary committee simply did not "result[] in the dimension of departure from the Constitution's textual commitment to the Senate of the 'sole Power to try all Impeachments' as to make this controversy justiciable and the claim meritorious." *Id.* at 14.

Nixon now appeals the District Court's judgment.

II. Analysis

A. *Subject-Matter Jurisdiction*

Before reaching the more difficult issues presented by Nixon's case, it is necessary to dispose of a claim by the appellees that the District Court lacked subject-matter jurisdiction. The appellees argue that Nixon's suit is essentially one for money damages in the form of back

pay. *See* Brief for Appellees and Amicus Curiae United States Senate ("Appellees Br.") at 37. Because that back pay would now amount to more than $10,000, the appellees argue, exclusive jurisdiction lies under the Tucker Act in the Claims Court, the only forum in which the United States has waived its sovereign immunity to such suits. *See* 28 U.S.C. § 1491 (1988). The appellees are mistaken.

Nixon relies upon the waiver of sovereign immunity found in the Administrative Procedure Act. That Act waives sovereign immunity for actions "seeking relief other than money damages" that allege illegal action by a federal agency or officer. *See* 5 U.S.C. § 702 (1988). Nixon's suit clearly alleges illegal action by a federal agency or officer, namely, actions taken by federal officials to effectuate his removal from judicial office following his impeachment and assertedly unconstitutional conviction by the Senate.

Nixon's suit also qualifies as one "seeking relief other than money damages." Nixon seeks only a declaration of the constitutional infirmity of his removal and of his entitlement to the pay and benefits of his former office; Nixon does *not* seek a judgment ordering the payment of any sum of money. Thus, "insofar as the complaint sought [only] declaratory . . . relief, it was certainly not an action for money damages." *Bowen v. Massachusetts*, 487 U.S. 879, 893, 108 S.Ct. 2722, 2731, 101 L.Ed.2d 749 (1988); *see also Dronenburg v. Zech*, 741 F.2d 1388, 1389-90 (D.C.Cir.1984); *Schnapper v. Foley*, 667 F.2d 102, 107-08 (D.C.Cir.1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1448, 71 L.Ed.2d 661 (1982).[4] Even if Nixon's

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[4] Moreover, in the wake of the Supreme Court's decision in *Bowen*, it would appear that even had Nixon sought back pay in this action, his suit would still not be one for "money damages" within the meaning of 5 U.S.C. § 702. In *Bowen*, the Court explained:

> Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a

suit might *later* give rise to some claim to monetary compensation, this fact would not render his instant suit one for "money damages." As this court has previously explained,

> even if a declaration by the district court could later be used as the basis for monetary relief, that possibility does not deprive the district court of authority to grant the requested relief. Declaratory relief is improper only if the plaintiffs' action is a mere pretext to avoid the exclusive jurisdiction of the Claims Court.

Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1533 (D.C.Cir.1984) (*en banc*) (footnotes omitted), *vacated on other grounds*, 471 U.S. 1113, 105 S.Ct. 2353, 86 L.Ed.2d 255 (1985); *see also Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376, 1379 (9th Cir.1981). There is surely no basis on the record in this case for us to conclude that Nixon framed his complaint as one for declaratory relief merely as a pretext to avoid the Claims Court.

The appellees are correct in asserting that Nixon may not rely on the waiver of sovereign immunity contained in the Administrative Procedure Act if he could obtain adequate relief in the Claims Court under the Tucker Act. *See* 5 U.S.C. §§ 702, 704 (1988); *see also* 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3659 (2d ed. 1985 & Supp. 1991). But relief

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> victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for *the reinstatement of an employee with back pay* . . . .

487 U.S. at 893, 108 S.Ct. at 2731-32 (emphasis added); *see also DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1381 n. 3 (10th Cir.1990) (citing *Bowen* for the proposition that "the bar on recovery of 'money damages' contained in 5 U.S.C. section 702 does not include equitable back[pay], which is a form of equitable relief, not monetary damages"), *cert. denied*, —— U.S. ——, 111 S.Ct. 799, 112 L.Ed.2d 860 (1991).

in that forum is limited largely to the awarding of monetary compensation. *See* 28 U.S.C. § 1491(a)(1) & (2) (1988); *see also Bowen v. Massachusetts*, 487 U.S. at 914-15, 108 S.Ct. at 2742-43 (Scalia, J., dissenting); *McEniry v. United States*, 7 Cl.Ct. 622, 625 ("It is clear that a plaintiff's *primary claim* must be one for monetary relief before this court can assert jurisdiction over the claim.") (emphasis added), *aff'd mem.*, 785 F.2d 323 (Fed.Cir.1985). And, in this case, I am in total disagreement with the appellees' suggestion that a money judgment for back pay and benefits is all that Nixon seeks or all that he needs to cure his asserted constitutional injury. The injury Nixon alleges as a result of his removal goes far beyond the loss of his salary. It includes not only removal from the federal bench, but permanent disqualification from holding Government office. *See* U.S. CONST. art. I, § 3, cl. 7 (officers removed upon impeachment suffer "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States"). Given the nature of Nixon's injury, it appears obvious that "the doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court," *Bowen v. Massachusetts*, 487 U.S. at 901, 108 S.Ct. at 2736; *see also id.* at 904, 108 S.Ct. at 2737, and that Nixon therefore properly relied on the waiver of sovereign immunity found in 5 U.S.C. § 702.

Thus, I find that the District Court correctly asserted subject-matter jurisdiction over Nixon's claim and now turn to the appellees's invocation of the political question doctrine.

B. *Justiciability*

The District Court found that, "[d]espite textual and historical indicators that the word 'try' carries with it some duty for Senators to sit as judge and jury, . . . plaintiff has not established the kind of clear violation of a specific constitutional requirement which would trig-

ger judicial authority to review a solemn and serious Senate action." *Nixon*, 744 F.Supp. at 13. The District Court thus accepted the appellees' argument that, "[e]ven though plaintiff's challenge to the constitutionality of Rule XI raises a serious question," the matter cannot be considered on the merits because Nixon has raised a nonjusticiable "political question." *Id.* I disagree.

It is, of course, not enough to avoid judicial review for the Government to point out that this is a "political" case, in the sense that the judiciary is asked to declare invalid action by a coordinate branch of Government in performing one of its core "political" functions. As the Supreme Court has reminded us time and again, "the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine," *INS v. Chadha*, 462 U.S. 919, 942-43, 103 S.Ct. 2764, 2779-80, 77 L.Ed.2d 317 (1983), and "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority," *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). Rather, what is required is a more "discriminating inquiry into the precise facts and posture of the particular case," *id.*, in an effort to determine whether the courts are genuinely incompetent to decide the matter.

Under the Supreme Court's landmark decision in *Baker v. Carr*, the political question doctrine comes into play only when,

> [p]rominent on the surface of a[] case . . . is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate

> branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. "Unless one of these formulations is inextricable from the case at bar," the Court concluded, "there should be no dismissal for nonjusticiability on the ground of a political question's presence." *Id.* Thus, the political question doctrine is narrowly confined; and, as history has shown, it is a rarely invoked limitation on judicial authority.

The appellees argue that Nixon's claim should be dismissed as nonjusticiable because of (i) a "textually demonstrable commitment" of impeachment questions to a coordinate branch, and (ii) the impossibility of deciding the case without expressing disrespect for the Senate. *See* Appellees Br. at 25-26. I reject both contentions.

1. "A Textually Demonstrable Commitment"

Article I, § 3, cl. 6, of the Constitution provides:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

The District Court held that this provision is a "textually demonstrable commitment" of impeachment questions to a coordinate branch of Government. Thus, because the Constitution expressly delegates to the Senate "the sole Power" to try impeachments, and because the Senate gave Nixon some "semblance of a trial," *Nixon*, 744 F.Supp. at 14, the trial court ruled that it was without authority to dictate more precisely "the *type* of trial

to be accorded," *id.* (emphasis in original); *accord Hastings*, 716 F.Supp. at 40-41.[5]

This sweeping view of nonjusticiability cannot be squared, however, with the Supreme Court's decisions in *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), and other more recent cases giving definition to the political question doctrine. A careful review of those cases is essential to a disposition of Nixon's claim.

Where the Constitution expressly assigns absolute discretion in a matter to the legislative or executive branch, the courts have no role to play in reviewing the exercise of that discretion. But, as the Court made clear in *Baker v. Carr*, not every constitutional assignment of power constitutes a "textually demonstrable constitutional com-

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[5] The District Court's view finds support in a 1936 decision of the Court of Claims, which held that the courts are without power to review any aspect of Senate action in trying and removing a federal official. *See Ritter v. United States*, 84 Ct.Cl. 293 (1936), *cert. denied*, 300 U.S. 668, 57 S.Ct. 513, 81 L.Ed. 875 (1937). There is also support for this view among commentators, some of whom have suggested broadly, along the lines of the *Ritter* opinion, that *any* challenge to congressional handling of an impeachment would be precluded by the Constitution's absolute textual assignment of that power to the legislative branch. *See, e.g.*, C. BLACK, IMPEACHMENT: A HANDBOOK 63 (1974) ("the courts have . . . no part at all to play" in reviewing Senate impeachment trials); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 2.15, at 109 (3d ed. 1986); C. WRIGHT, THE LAW OF FEDERAL COURTS § 14, at 81 (4th ed. 1983) ("Most commentators . . . have adhered to the orthodox view that the courts have no role to play with regard to impeachment.") (footnote omitted); Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY.L.J., 707, 728-32 (1987-1988); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV.L.REV. 1, 8 (1959). These commentators argue that senators will be made sufficiently attentive to their constitutional duty by their accountability to the voters and that the courts should leave it to the political process to discipline any arguable abridgements of the Constitution. *See* Rotunda, *supra*, at 730; Tushnet, *Principles, Politics, and Constitutional Law*, 88 MICH.L.REV. 49, 57-58 (1989).

mitment" within the contemplation of the political question doctrine. There are many broad delegations of authority to coordinate branches of Government that do not result in nonjusticiable questions merely by virtue of the breadth of the assigned authority. For example, the Constitution assigns to Congress the "Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3, and yet no one reasonably would suggest that it is beyond the authority of the courts to review congressional enactments regulating interstate commerce. *Cf. County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 249, 105 S.Ct. 1245, 1259, 84 L.Ed.2d 169 (1985) ("Congress' plenary power in Indian affairs under Art. I, § 8, cl. 3, does not mean that litigation involving such matters necessarily entails nonjusticiable political questions"). Rather, what makes a "textually demonstrable commitment" is not merely a textual assignment of power, but a textual assignment of *absolute discretion* in a particular matter to a coordinate branch.

The distinction at times may seem elusive, but it is usefully illuminated by comparing two lines of cases interpreting the same clause of the Constitution. Article I provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." U.S. CONST. art. I, § 5, cl. 1. Because this clause unequivocally states that each house of Congress—rather than the courts—shall be "the Judge" of these matters, it has been held that courts may not consider a claim that the House or Senate seated the wrong candidate following a contested congressional election. There being no dispute in these cases that the Senate or House has in fact "judged" the election returns, but only that it got the factual result wrong, there can be no dispute that the final word on the counting of ballots has been assigned outside the judiciary. *See Roudebush v. Hartke*, 405 U.S. 15, 19, 92 S.Ct. 804, 807-08, 31 L.Ed.2d 1

(1972) (dicta); *Webster v. Doe*, 486 U.S. 592, 612, 108 S.Ct. 2047, 2058, 100 L.Ed.2d 632 (1988) (Scalia, J., dissenting); *Morgan v. United States*, 801 F.2d 445, 447 (D.C.Cir.1986) (Scalia, J.), *cert. denied*, 480 U.S. 911, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987); *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir.1985). If courts were permitted to review a congressional decision to seat a particular candidate by recounting the ballots or scrutinizing other findings of fact, the judiciary, and not the Congress, would in the last analysis be "the judge" of election returns.

The Supreme Court considered a somewhat different claim grounded in the same clause, however, in *Powell v. McCormack*, and there found the issue justiciable. In that case, Congressman Adam Clayton Powell, Jr., challenged a House of Representatives' decision barring Powell from taking his seat. The House, citing alleged financial misconduct, contended that it had "judged" Powell unqualified to serve as a member. Powell argued that "Qualifications" under article I, section 5, must be construed to include only the standing requirements expressly listed in the Constitution itself (*i.e.*, age, citizenship and residency), while the House insisted that the Constitution assigned nonreviewable discretion to the Congress to define and judge those "Qualifications" for itself.

The Supreme Court held that Powell's challenge did *not* present a nonjusticiable political question. The Court began its analysis by observing the paradox that an assessment of whether a constitutional claim is reviewable unavoidably requires that judges initially review the relevant constitutional language and give it content. "In order to determine whether there has been a textual commitment to a co-ordinate department of the Government," the Court wrote, "we must interpret the Constitution." 395 U.S. at 519, 89 S.Ct. at 1963. Accordingly, the Court undertook an extensive review of the

text and historical practice concerning legislative qualification and exclusions and concluded that the framers intended the term "Qualifications" to include only those standing requirements listed in article I, section 2, of the Constitution:

> In short, both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote.

Id. at 548, 89 S.Ct. at 1978. Consequently, the Court held that Congress' textual authority to be "the Judge" of the "Qualifications" of its members did *not* empower Congress to be "the Judge" of what the Constitution means by "Qualifications"; that task remained with the courts. Rather, "Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution." *Id.* While challenges to Congress' factual rulings on age, citizenship and residency might be nonjusticiable, the Court held, a claim that Congress had exceeded the textual bounds of its authority by excluding a member on grounds other than his constitutional "Qualifications" is amenable to judicial review. *See id.* at 520-22 & n. 42, 89 S.Ct. at 1963-64 & n. 42.

It is clear from the Supreme Court's rulings in *Powell* and *Roudebush*, then, that while the courts may well be barred from second-guessing Congress' fact-finding and policy judgments within the zones of discretion assigned it by the Constitution, the courts *may* review claims that Congress has exceeded an explicit textual limitation on its powers.

The justiciability of Nixon's claim is directly controlled by *Powell*. I recognize that a challenge to the factual findings underlying the Senate's conviction, *e.g.*, a claim

that the party convicted had not actually committed the misconduct of which he was accused, would almost certainly be nonjusticiable—just as *Powell* suggested that a fact-based challenge to the exclusion of a member for failing to satisfy the standing requirements of age, citizenship or residency might be, *see* 395 U.S. at 521 n. 42, 89 S.Ct. at 1963 n. 42, and as *Roudebush* and *Morgan* suggested that a claim that the Senate or House had misjudged the retuns in a close election would be. A claim, however, that the Senate exceeded the textual bounds of its authority by convicting a judge on articles of impeachment without first "try[ing]" him within the constitutional meaning of that term—as Nixon claims in this case—*is* justiciable. Unlike the plaintiff in *Morgan*, who effectively asked this court to supplant the House as "the Judge" of an election, Nixon does not ask us to supplant the Senate as the "tr[ier]" of his impeachment; he asks only that we review the Senate's conduct to ensure that *it* in fact tried him as requided by the Constitution. It is the courts' task to interpret and give content to the word "try," just as it was the Court's job in *Powell* to give meaning to the word "Qualifications."[6]

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[6] The majority emphasizes that the Senate enjoys not merely the constitutional power of trying impeachments, but the "*sole* Power" of trying impeachments. But the presence of the word "sole" does not answer the question presented in this case. That the framers intended that the Senate, and no one else, would "try all Impeachments," does not tell us what the framers would have intended in the situation presented here, where the Senate has assertedly abdicated the power assigned it by removing Nixon without trial. Accordingly, historical evidence that the framers decided against permitting courts to *try impeachments* is simply not dispositive of the justiciability of Nixon's claim. We are not called upon today to "try" Nixon's impeachment, but merely to determine whether the Senate did so.

It is for this same reason that the majority's reliance on *Roudebush* is inapt. Although the Court there suggested that courts have no power to review the Senate's performance of its constitutional role of "judging" election contests, it did *not* address whether courts

The District Court also suggested that judicial review of Nixon's claim might be foreclosed by the Constitution's textually demonstrable assignment to the Senate of the power to "determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2; *see Nixon*, 744 F.Supp. at 13, 14. But this assignment of power, like the assignment of power to Congress to regulate interstate commerce or to provide for the general welfare, may be exercised only within the constraints of other constitutional provisions.[7] The Sen-

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also would be powerless to intercede where the Senate had *refused* to carry out that constitutional function.

As one commentator explained:

> The lesson of *Powell* is that the Supreme Court may use judicial review to determine whether Congress followed the proper procedure for making the political decision committed to it by the Constitution. *Powell* does not allow overly intrusive judicial review, but rather allows review solely to ensure that Congress made the particular kind of political decision intrusted to it by the Constitution.

Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX.L.REV. 1, 99-100 (1989); *accord* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 116-19 (1973); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 605 n. 26 (1976) ("Even the unique [textual] instance, '[t]he Senate shall have the *sole* Power to try all Impeachments,' does not necessarily preclude the argument that while the Senate alone is to be the judge in impeachment proceedings, the courts can review how it does it, at least for constitutional excesses or infirmities.") (emphasis in original); Tushnet, *supra* note 5, at 57 (agreeing that *Powell* compels the conclusion that such questions are justiciable); *cf. Mitchell v. Laird*, 488 F.2d 611, 614-15 (D.C.Cir.1973) (Wyzanski, J., by designation) (political question doctrine would not bar court from deciding "whether the hostilities in Indo-China constitute in the Constitutional sense a 'war'" within the meaning of art. I, § 8, cl. 11, but "we deem it a political question . . . for Congress to decide in which form, if any, it will give its consent to the continuation of a war already begun by a President acting alone").

[7] Nearly a century ago, the Supreme Court observed:

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a

ate could not, for example, constitutionally pass a "rule" allowing conviction and removal of impeached officers by a majority vote,[8] and the fact that the Senate's action had been taken pursuant to its "rulemaking" authority would provide no shield against judicial invalidation. As this court has previously explained, "Art. I[, § 5, cl. 2,] simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt. Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity." *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C.Cir.), *cert. denied*, 464 U.S. 823, 104 S.Ct. 91, 78 L.Ed.2d 98 (1983).[9] Here, Nixon alleges that the

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> reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But *within these limitations* all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just . . . . [This rulemaking power] is[,] . . . *within the limitations suggested*, absolute and beyond the challenge of any other body or tribunal.

United States v. Ballin, 144 U.S. 1, 5, 12 S.Ct. 507, 509, 36 L.Ed. 321 (1892) (emphasis added).

[8] *See* U.S. CONST. art. I, § 3, cl. 6 ("And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

[9] In *Vander Jagt*, 14 Republican congressmen sued the Democratic leadership of the House of Representatives, alleging that the Democrats were allocating disproportionately few seats on key committees to the minority party, in violation of the Republicans' Fifth Amendment rights. The District Court found the matter nonjusticiable under the political question doctrine, in part because article I, section 5, of the Constitution assigns to the House the power to "determine the Rules of its Proceedings." *Vander Jagt v. O'Neill*, 524 F.Supp. 519, 521 (D.D.C.1981). On review, this court reversed the trial court's justiciability ruling. Although the court went on, for prudential reasons, to decline to exercise its discretionary remedial authority, it made clear that the political question doctrine presented no bar to the court's review. *See* 699 F.2d at 1173-74, 1177.

Senate, by way of Rule XI, has violated an explicit textual limitation on its powers by removing him without first "try[ing]" him. We may well disagree with Nixon on the merits, but that disagreement is not grounds for finding his claim nonjusticiable.

The District Court in this case went astray by taking essentially the opposite approach—first finding that the Senate had not committed a clear constitutional violation and then finding that its action was somehow consequently beyond judicial review. *See Nixon*, 744 F.Supp. at 13 ("[P]laintiff has not established the kind of clear violation of a specific constitutional requirement which would trigger judicial authority to review a solemn and serious Senate action."). It appears that, for the District Court, "[t]he issue on justiciability turns ultimately" upon the merits of Nixon's claim, *i.e.*, "on the narrow question of whether the Senate's specific denial of this plaintiff's motions for leave to take testimony before the open Senate denied him the kind of trial clearly guaranteed to him by the Constitution." *Id.* By this approach, however, the finding of nonjusticiability becomes largely a shorthand label for the court's ultimate conclusion that there has been no constitutional violation, or, to put it more precisely, that the governmental defendant did not exceed the bounds of the discretionary authority assigned it by the Constitution. *See generally* Henkin, *supra* note 6, at 601, 605-06.[10] It is misleading, however,

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[10] Professor Henkin argues that this approach charactreizes virtually all of the cases in which courts have claimed to find nonjusticiable "political questions":

> The cases which are supposed to have established the political question doctrine required no such extra-ordinary abstention from judicial review; they called only for the ordinary respect by the courts for the political domain. Having reviewed, the Court refused to invalidate the challenged actions because they were within the constitutional authority of President or Congress. In no case did the Court have to use the phrase "political

to suggest in such an instance that the court has declined to engage in judicial review. If the political question doctrine is to have any integrity as a constraint upon judicial review, its invocation must arise from an analysis of the Constitution that stands apart from any conclusion on the merits of the particular claim presented.

Consequently, adhering to the Supreme Court's guidance in *Powell*, I reject the argument that Nixon's challenge is nonreviewable because of a "textually demonstrable commitment" of the issue to a cooordinate branch.

2. Disrespect to the Senate

Alternatively, the appellees argue that Nixon's claim should be held nonjusticiable because of "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217, 82 S.Ct. at 710; *see* Appellees Br. at 28-29. Judicial review of the Senate's decision to employ a committee in trying impeachments would be particularly insulting, the Government argues, because the record reveals that the Senate gave thoughtful and careful consideration to the constitutionality of its decision. *See* Appellees Br. at 28, 49-50.

This claim, too, however, must be rejected in light of the Supreme Court's holdings in *Powell* and subsequent cases. In *Powell*, the Court rejected the notion that its ruling invalidating the House of Representatives' exclu-

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question," and when it did, it was using it in a different sense, saying in effect: "We have reviewed your claims and we find that the action complained of involves a political question, and is within the powers granted by the Constitution to the political branches. The act complained of violates no constitutional limitation on that power, either because the Constitution imposses no relevant limitations, or because the action is amply within the limits prescribed. We give effect to what the political branches have done because they had political authority under the Constitution to do it."

Henkin, *supra* note 6, at 601 (footnote omitted).

sion of Powell would express disrespect for the House. The Court stated summarily:

> Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.

Powell, 395 U.S. at 549, 89 S.Ct. at 1978 (footnote omitted); *accord United States v. Munoz-Flores*, —— U.S. —— 110 S.Ct. 1964, 1968-69, 109 L.Ed.2d 384 (1990); *Goldwater v. Carter*, 444 U.S. 996, 1001, 100 S.Ct. 533, 536, 62 L.Ed.2d 428 (1979) (Powell, J., concurring in the judgment) ("Interpretation of the Constitution does not imply lack of respect for a coordinate branch."). If the Court may respectfully inform the House that it has unconstitutionally excluded one of its own members, it surely may respectfully inform the Senate that it has unconstitutionally convicted a judge without "try[ing]" him in an impeachment. Indeed, were we to accept the Government's view of what constitutes "disrespect" to a coordinate branch, "*every* judicial resolution of a constitutional challenge to a congressional [action] . . . would be impermissible." *Munoz-Flores*, 110 S.Ct. at 1968 (emphasis in original).

The fact that the Senate vigorously debated the constitutionality of its actions likewise fails to render Nixon's claim nonjusticiable. The Supreme Court pointedly rejected this suggestion only last year:

> Congress often explicitly considers whether bills violate constitutional provisions. Because Congress is bound by the Constitution, its enactment of any law is predicated at least implicitly on a judgment that the law is constitutional. . . . Yet such congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the laws' con-

> stitutionality. On the contrary, this Court has the duty to review the constitutionality of congressional enactments.

Id. at 1968-69 (citations omitted).

In light of these admonitions from the Supreme Court, we cannot agree with the appellees that judicial review of Nixon's claim is foreclosed because it might express disrespect for the Senate.

3. Conclusion on Justiciability

This court has previously acknowledged that "[t]he political question doctrine is a tempting refuge from the adjudication of difficult constitutional claims." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1514 (D.C. Cir.1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113, 105 S.Ct. 2353, 86 L.Ed.2d 255 (1985). And, yet, cognizant that "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority," *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. at 710, and that the "shifting contours and uncertain underpinnings [of the political question doctrine] make it susceptible to indiscriminate and overbroad application to claims properly before the federal courts," *Ramirez de Arellano*, 745 F.2d at 1514, we have been diligent in resisting the temptation.

The narrow scope of the political question doctrine is evident from the Supreme Court's treatment of the issue in recent cases. In the nearly 30 years since *Baker v. Carr*, the Supreme Court has turned aside assertions of nonjusticiability under the doctrine in more than a dozen cases.[11] In only one, *Gilligan v. Morgan*, 413 U.S. 1, 93

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[11] *See United States v. Munoz-Flores*, —— U.S. ——, 110 S.Ct. 1964, 1968-71, 109 L.Ed.2d 384 (1990); *Quinn v. Millsap*, 491 U.S. 95, 102, 109 S. Ct. 2324, 2329, 105 L.Ed.2d 74 (1989); *Japan Whaling*

S.Ct. 2440, 37 L.Ed.2d 407 (1973), has the Court held that a case presented a nonjusticiable political question, and it is plain that *Gilligan*'s holding does not extend far beyond the unique facts of that case.[12]

Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 229-30, 106 S.Ct. 2860, 2865-66, 92 L.Ed.2d 166 (1986); *Davis v. Bandemer*, 478 U.S. 109, 118-27, 106 S.Ct. 2797, 2802-08, 92 L.Ed.2d 85 (1986); *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 248-50, 105 S.Ct. 1245, 1258-60, 84 L.Ed.2d 169 (1985); *INS v. Chadha*, 462 U.S. 919, 940-43, 103 S.Ct. 2764, 2778-80, 77 L.Ed.2d 317 (1983); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83-84, 97 S.Ct. 911, 918-19, 51 L.Ed.2d 173 (1977); *Elrod v. Burns*, 427 U.S. 347, 351-53, 96 S.Ct. 2673, 2678-80, 49 L.Ed.2d 547 (1976) (plurality opinion); *Stanton v. Stanton*, 421 U.S. 7, 11, 95 S.Ct. 1373, 1376, 43 L.Ed.2d 688 (1975); *United States v. Nixon*, 418 U.S. 683, 692-97, 94 S.Ct. 3090, 3099-03, 41 L.Ed.2d 1039 (1974); *Powell v. McCormack*, 395 U.S. 486, 516-49 (1969); *Williams v. Rhodes*, 393 U.S. 23, 28, 89 S.Ct. 5, 9, 21 L.Ed.2d 24 (1968); *Reynolds v. Sims*, 377 U.S. 533, 582, 84 S.Ct. 1362, 1392, 12 L.Ed.2d 506 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 5-7, 84 S.Ct. 526, 528-30, 11 L.Ed.2d 481 (1964).

In other cases, the Court has narrowly construed the doctrine without expressly ruling on its application. *See, e.g., Davis v. Passman*, 442 U.S. 228, 235 n. 11, 99 S.Ct. 2264, 2272, 60 L.Ed.2d 846 (1979). In still others, the Court, without addressing the question of justiciability, "has passed on a variety of issues that previously would have been thought not to be justiciable." C. WRIGHT, *supra* note 5, § 14, at 77.

[12] The Court's finding of nonjusticiability in *Gilligan* was dictated more by the extraordinary remedy sought than by the legal or constitutional questions presented. The plaintiffs in that case had brought a challenge under 42 U.S.C. § 1983, in the wake of the 1970 Kent State tragedy, to the way in which Ohio trained and supervised its National Guard. As relief, the plaintiffs did not seek damages but rather an injunction against future constitutional violations and, specifically, court supervision of future Guard policies and activities. *See Gilligan*, 413 U.S. at 5-6, 93 S.Ct. at 2443-44. Six Justices (Douglas, Brennan, Stewart, Marshall, Blackmun & Powell, JJ.) considered the plaintiffs' core claims to have been mooted by subsequent voluntary efforts by Ohio to reform its Guard, including the institution of new training programs. *See id.* at 12, 93 S.Ct. at 2446-47 (Douglas, Brennan, Stewart & Marshall, JJ., dissenting); *id.* at 13,

It is against this backdrop that we must consider Nixon's case. Because Nixon has alleged that the Senate exceeded an explicit textual limitation on its authority by convicting him without first "try[ing]" him in the sense required by the Constitution, I conclude that the courts are competent to hear his claim. At oral argument, counsel for the Government implicitly conceded this court's authority to review Nixon's claim by agreeing that this court *could* review a claim that the Senate had unconstitutionally delegated its authority to try impeachments to a randomly chosen group of schoolchildren, reserving to itself only the task of formally approving whatever result that group recommended. In both this case and that hypothetical, however, the basis for the constitutional claim is identical: that the Senate has not "tried" the accused within the meaning of the Constitution. If the court is competent to hear one claim, it must be competent to hear the other.

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93 S.Ct. at 2447 (Blackmun, J., concurring). A majority of the Court also held that to the extent the plaintiffs sought continuing judicial supervision against possible *future* Guard abuses, they had presented a nonjusticiable political question. *See id.* at 7-8, 10, 93 S.Ct. at 2444-45, 2445-46. As Justice Blackmun explained in his concurring opinion:

> This case relates to prospective relief in the form of judicial surveillance of highly subjective and technical matters involving military training and command. As such, it presents an "[inappropriate] . . . subject matter for judicial consideration," for respondents are asking the District Court, in fashioning that prospective relief, "to enter upon policy determinations for which judicially manageable standards are lacking."

Id. at 14, 93 S.Ct. at 2448 (Blackmun, J., concurring) (quoting *Baker v. Carr*, 369 U.S. at 198, 226, 82 S.Ct. at 699-700, 715: bracketed material in original); *see also* Henkin, *supra* note 6, at 619-22 (noting the aberrational posture of the *Gilligan* case and concluding: "It was something closer to denying an equitable remedy, than to abstaining from judicial review and dismissing for nonjusticiability, that the Supreme Court may have been (and should have been) about" in *Gilligan*).

Because I find this case squarely controlled by *Powell v. McCormack*, I conclude that Nixon's claim is justiciable.

C. *The Merits*

Resolution of the merits of Nixon's claim requires an exploration of the text of the Constitution and the history of its framing in an effort to determine what is meant by the constitutional requirement that the Senate "try" impeachments.[13] To that end, I look first to the words used by the framers, both in the text of the Constitution and in other documents reflective of their understanding, and then to historical practice, both in America and in England. These inquiries lead me to conclude that the Senate's use of a committee to gather evidence and hear witnesses relating to the charges against Nixon did not deprive Nixon of any constitutionally protected right.

1. Theoretical Framework

It is plain enough that the framers, by assigning to the Senate the task of "try[ing] all Impeachments," intended that senators would act in a quasi-judicial capacity in

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[13] Although the District Court did not purport to reach the merits of Nixon's claim, we would not be required to remand to the trial court for initial review of the merits. Because the factual record was fully developed below and because the merits were fully briefed and argued both in this court and in the trial court, appellate review would cause no "undue surprise or prejudice." *Grace v. Burger*, 665 F.2d 1193, 1197 n. 9 (D.C.Cir.1981), *aff'd in part & vacated in part on other grounds sub nom. United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). Indeed, to the contrary, "a remand to the District Court, which inevitably would result in a future appeal to this court, 'would be a waste of judicial resources.'" *Id.* (quoting *United States v. Aulet*, 618 F.2d 182, 186 (2d Cir. 1980)); *see also Powell*, 395 U.S. at 550 (no remand necessary following Court's reversal of lower court's finding of nonjusticiability where only facts essential to disposition were already conclusively established).

convicting and removing high federal officials. By using a word used elsewhere in the Constitution to refer to judicial proceedings, the framers appeared to reveal an intention that Senate impeachment "trials" would bear some rough likeness to the sort of "trials" carried out in criminal courtrooms. In providing for criminal jury trials, for example, the framers were careful to except impeachment trials. *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by jury. . . ."). While this express exception suggests that the framers did not intend to require the Senate to observe all procedural incidents of criminal trials, it also suggests that the framers may have thought of an impeachment trial as a type of criminal trial. Consequently, the Constitution's use of the word "try" to describe the Senate's function in rendering impeachment judgments implies a duty to accord at least the rudimentary hallmarks of judicial fact-finding, including the receipt of evidence, the examination of witnesses, right to counsel and a chance for hearing by the accused.

The inference that the framers intended impeachment trials to be roughly akin to criminal trials is reinforced by seemingly unrefuted statements made by Alexander Hamilton during the ratification debates. In *The Federalist No. 65*, for example, Hamilton wrote that the Senate, in trying impeachments, would act in a "judicial character as a court." THE FEDERALIST NO. 65, at 439 (A. Hamilton) (J. Cooke ed. 1961). Hamilton described the purpose of impeachment as a "NATIONAL INQUEST into the conduct of public men" in which the ultimate aim of the trial was a "real demonstration[] of innocence or guilt." *Id.* at 440.

The framers' determination that the Senate should have the sole authority to try impeachment cases reflected their desire to harness the forces of partisanship in such matters and to elevate the influence of reason, objectivity

and fairness. *See id.* at 440-42.[14] As Hamilton noted, the Senate was seen to "possess the degree of credit and au-

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[14] *See* R. BERGER, *supra* note 6, at 79 n. 130 (quoting Jefferson as warning: "history shows, that in England, impeachment has been an engine more of passion than of justice"). The framers intended that impeachment serve as a check against abuses of power by the judiciary or the executive, and yet they were also alert to the danger that impeachment itself might be abused as a crude bludgeon against political opponents. *See* THE FEDERALIST No. 65, *supra*, at 444 (urging that prompt Senate trial might be needed to check "persecution . . . [by] an intemperate or designing majority in the House of Representatives"); *see also* P. HOFFER & N. HULL, IMPEACHMENT IN AMERICA, 1635-1805, at 99 (1984).

This concern is also reflected in the requirement that conviction be voted by a two-thirds, rather than a simple, majority:

> [Impeachment decisions] should not be "popular." The Constitution assigned this labor to the Senate because the delegates expected the upper house to rely upon its own wisdom, information, stability, and even temper. There was no occasion, Hamilton opined, upon which the Senate should be more deliberative and shielded from popular clamors than when it sat to hear impeachments.

Id. at 106; *see also id.* at 99 ("Later [after the Constitutional Convention], both James McHenry and Luther Martin of Maryland recalled that the Senate seemed to be the only body likely to view impeachments in a cool and dispassionate manner.") (footnote omitted); Address of James McHenry before the Maryland House of Delegates (Nov. 29, 1787) ("[T]he power of trying impeachments was lodged with this Body [the Senate] as more likely to be governed by cool and candid investigation, than by those heats that too often inflame and influence more populous Assemblys."), *reprinted in* III THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 144, 148 (M. Farrand rev. ed. 1966) [hereinafter M. FARRAND]; Remarks of Luther Martin upon the Impeachment Trial of Justice Chase (Feb. 23, 1804), *reprinted in* III M. FARRAND, *supra*, at 406. In this regard, the framers may well have drawn upon lessons from English history, in which the House of Lords stood as a steadying check against the House of Commons' willingness to impeach, on the basis of political disagreement, officials who had committed no conduct that could be considered treasonous or otherwise unlawful. *See* P. HOFFER & N. HULL, *supra*, at 5-6; Roberts, *The Law of*

thority, which might, on certain occasions, be indispensable, towards reconciling the people to a decision, that should happen to clash with an accusation brought by their immediate representatives." *Id.* at 441. Hamilton also recognized that there were advantages to be gained in trying impeachments in a "tribunal more numerous than would consist with a reasonable attention to economy," as with a judicial tribunal. *Id.*

In further explaining why impeachment trials were assigned to the Senate rather than to a court, however, Hamilton wrote:

> [Impeachment proceedings] can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the Judges, as in common cases serve to limit the discretion of courts in favor of personal security.

Id. Instead, it was unavoidable, Hamilton wrote, that a court of impeachment, sitting in judgment of officials charged with essentially "political" offenses, *id.* at 439 (original capitalization omitted), would be left to exercise an "awful discretion" in carrying out its task, *id.* at 441. The Senate was best fitted to serve in this capacity, the framers reasoned, because its relative insulation from the electorate would give it the necessary independence of judgment and its paramount prestige would give that judgment the credibility and authority that might be re-

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Impeachment in Stuart England: A Reply to Raoul Berger, 84 YALE L.J. 1419 (1975).

Consequently, the framers "designed a deliberately cumbersome removal mechanism . . . to provide additional protection of the judiciary against congressional politics." Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH.L.REV. 765, 767 (1989); *see also* THE FEDERALIST No. 79, at 533 (A. Hamilton) (J. Coode ed. 1961) (constitutional impeachment mechanism "is the only provision on the point[] which is consistent with the necessary independence of the judicial character").

quired to command adherence from an "agitate[d]" and "divide[d]" people. *See id.* at 439, 441.

From all of these statements, it can be reasonably inferred that the framers intended that the Senate would approach its duty of trying impeachments with the solemnity and impartiality befitting judicial action but with greater procedural flexibility than attends ordinary criminal trials. *See* Gerhardt, *supra* note 6, at 89-91.[15]

2. Historical Practice

From the beginning, historical practice confirmed the framers' understanding that impeachment trials would occupy a middle ground between the free-wheeling partisanship of legislative decisionmaking and the rigid procedural formalities of judicial criminal trials. From the earliest state and federal impeachments, it was agreed that "[s]trict adherence to criminal procedure would hamstring the jurisdiction of the upper house, for the senators were not jurors, and the offenses need not be crimes." P. HOFFER & N. HULL, *supra* note 14, at 125. "At the same time, the defendant was allowed many of the protections guaranteed in a criminal trial." *Id.*[16]

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[15] I have already noted that the Constitution itself was careful to except impeachment trials from the obligation to try criminal cases before a jury. *See* U.S. CONST. art. III, § 2, cl. 3. In addition, the Constitution expressly limits the penalties that may be imposed upon conviction on impeachment to removal from office and future disqualification, *see* U.S. CONST. art. I, § 3, cl. 7, reserving more serious penal consequences, such as incarceration, for criminal conviction.

[16] "This understanding," hammered out in early impeachment trials of state officials by state legislatures, "was reiterated at the [federal] impeachment trials of ex-senator William Blount, federal judge John Pickering, and Supreme Court Justice Samuel Chase, though the extent of allowable deviation from criminal procedure was subject to controversy." P. HOFFER & N. HULL, *supra* note 14, at 125 (footnote omitted).

The question remains, despite the consensus that an "[i]mpeachment trial was to be distinguished from regular trials at law," *id.*, whether the use of special committees to receive evidence is consistent with the framers' theoretical framework, *i.e.*, whether the greater procedural flexibility accorded the Senate in "try[ing]" impeachments is broad enough to permit the use of evidentiary committees. American historical practice on this point arguably is weighted toward trial by the full Senate, for the Senate employed an impeachment trial committee for the first time only in 1986. *But see* Part II.C.2.b *infra*. There is precedent from England, however, supporting the use of committees, and this English practice may be read to suggest that the framers did not intend to foreclose the possibility in American constitutional practice.

a. English Practice

The constitutional framework for impeachments was modeled after the English experience of bringing impeachments in the House of Commons followed by trial before the House of Lords. *See* THE FEDERALIST NO. 65, *supra*, at 440. Although it is probably an overstatement to say that "almost the entire process [of American impeachments] was lifted bodily from English practice," *see* R. BERGER, *supra* note 6, at 179 (footnote omitted), there is no doubting the significant influence that English impeachment practice had on impeachment theory and practice under the American constitution.[17]

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[17] The chief scholarly controversy appears to center upon whether the Constitution's impeachment provisions were more directly influenced by English impeachment practice or by the early colonial experiments with impeachment. *Compare* R. BERGER, *supra* note 6, at 54-55 & n. 9, 76, 84-85, 90, 171 & n. 217 (emphasizing English influence) *with* P. HOFFER & N. HULL, *supra* note 14, at xii, 96-97, 268 (emphasizing influence of state and colonial impeachment practices and criticizing Berger's reliance on English precedent) *and*

Although the House of Lords did not adhere strictly to any single procedure for trying impeachments in the years leading up to the American Constitutional Convention, the Lords were careful, at least as of the early 1600s, to afford the accused certain procedural safeguards, such as the right to counsel and a limited right to discovery. *See* P. HOFFER & N. HULL, *supra* note 14, at 5; Williams, *The Historical and Constitutional Bases for the Senate's Power To Use Masters or Committees To Receive Evidence in Impeachment Trials*, 50 N.Y.U.L. REV. 512, 523-25 (1975). Over these years, "the English trial process was in a state of evolutionary flux," and "[t]he American Founding Fathers were well aware of the unsettled character of English impeachment proceedings." Williams, *supra*, at 523.

In English practice, most impeachment trials were conducted before the full assembly of the House of Lords, just as American impeachments were customarily tried in their entirety before the full Senate. There were, however, exceptions in which the House of Lords employed special committees to receive evidence in advance of final consideration and a vote by the full body. A review of English impeachment precedent

> shows beyond doubt that the House of Lords used committees to hear evidence during impeachment

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Gerhardt, *supra* note 6, at 22 (same). At bottom, however, there is no dispute that English practice, with certain explicit exceptions, served as the foundational model for the American constitutional provisions. As one commentator recently summarized:

> The impeachment procedure set forth in the United States Constitution has its origin in the states' experiences with impeachment prior to the Constitutional Convention. These state procedures were in turn influenced by the English experience with impeachment from the thirteenth through the eighteenth centuries.

Gerhardt, *supra* note 6, at 10 (footnotes omitted).

> trials in the early 17th Century. It is difficult to determine definitively whether this practice continued, as no direct reference to the use of committees during later impeachment trials has been discovered. It is clear, however, that, unlike other practices which were outlawed by affirmative action of the House of Lords, the use of committees to take evidence and examine witnesses has never been banned or disavowed as precedent—as were other impeachment procedures considered to have been wrongly invoked.

Id. at 531-32 (footnotes omitted). Thus, the English notion of an impeachment "trial," upon which American theory was ultimately modeled, allows for the use of special committees to gather evidence and hear witnesses in advance of final deliberations before the full body designated to decide the question.

b. American Practice

During the first 199 years of American constitutional history, there is no documented record of any use by the Senate of an evidentiary committee in an impeachment proceeding. But the uniformity of hearings before the full Senate, at a time when impeachments were rare and the Senate was smaller, does not necessarily mean that the framers intended that committees could never be used as a tool in impeachment trials. There is simply no basis in the historical record to believe that the Senate's failure to employ a committee during its early impeachment trials reflected any considered judgment that such an alternative was beyond its constitutional authority. Rather, all we know is that, for many years, the Senate apparently found it unnecessary even to consider using evidentiary committees in impeachment proceedings, and none was used; but when circumstances were perceived to be different in 1935, the Senate adopted Rule XI al-

lowing for the use of such committees. *See* Williams, *supra*, at 540.[18]

The origin of Rule XI confirms that its adoption was motivated by evolving circumstances in which full evidential hearings on the Senate floor were becoming increasingly unwieldy and, in all probability, prejudicial to the interests of the accused. The idea of establishing evidentiary committees in connection with impeachment trials was first proposed in 1904, when "Senators, aware of the growth in the Senate's size and of the accelerating development of its legislative function, beg[a]n to voice concern about the onerousness of their impeachment duties." *Id.* That early proposal languished in the Senate Rules Committee but was revived 30 years later after poor attendance by senators at subsequent impeachment trials proved an institutional embarassment. *See id.* at 541-42.

At the 1913 trial of Circuit Judge Robert Archbald, for example, at a time when the Senate was composed of 94 members,

> Judge Archbald's counsel, Alexander Simpson, was distressed to find that the trial proceedings rarely attracted the attention of more than 20 Senators and that even the composition of the group attending was constantly changing: following their normal routines, the Senators, far from behaving like judges and jurors during a trial, wandered in and out of the Senate chamber at will, often gathering only in response to a quorum call.

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[18] In the years since the Constitution's ratification, the Senate has grown from 26 to 100 members and the federal juriciary has grown more than forty-fold. The pace of impeachments also appears to have increased. From the nation's founding until 1985, there were 11 impeachment trials in the Senate, roughly one every generation, *see* Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 25 (1970); Williams, *supra*, at 540; since 1985, there have been three.

Id. at 541 (footnote omitted). Attendance was even smaller at the 1933 trial of District Judge Harold Louderback. Representative Hatton Sumners, one of the House impeachment managers, complained to *Time* magazine that "[a]t one time only three senators were present and for ten days we presented evidence to what was practically an empty chamber." *Id.* at 542 n. 160 (quoting TIME, Mar. 13, 1936, at 18). Concerns over the Senate's handling of these trials led directly to the adoption of Rule XI.

Given the foregoing history, I do not view the Senate's earlier experience in conducting full evidentiary proceedings on the Senate floor as revelatory of any constitutional commandment. Moreover, there is at least one express acknowledgment in early American writings that the Senate might employ evidentiary committees in trying impeachments. While he was serving as vice president of the United States and president of the Senate, Thomas Jefferson drafted what is still regarded as the most authoritative manual on the rules of the Senate. In it, he noted that the Senate's rules are in part derived from English parliamentary practice and that English practice permitted the use of evidentiary committees. In the House of Lords, Jefferson observed with apparent approval,

> [t]he practice is to swear the witnesses in open House, and then examine them there; *or a committee may be named, who shall examine them in committee,* either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand.

T. JEFFERSON, JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE, *reprinted in* H.DOC. NO. 277, 98th Cong., 2d Sess. 109, 296 (1985) (emphasis added). This suggests that, at least in Jefferson's view, no constitutional impediment existed to the Senate's use of committees in trying impeachments. As one scholar has noted, although

Jefferson was not himself a member of the Constitutional Convention, "[s]ince the *Manual*'s publication followed close on the heels of the Constitution's ratification, we may assume that its conclusions are not at odds with the intentions of the framers." Williams, *supra*, at 539. In any event, while Jefferson's views are not dispositive, they do give further evidence of the relevance of the English tradition.

I recognize that the occasional English use of committees in trying impeachments is not a conclusive answer to the question regarding the intentions of the Constitution's framers. There were, after all, elements of English impeachment practice—such as the imposition of criminal and even capital punishment upon conviction and the allowance for conviction by vote of a simple majority—that the framers affirmatively sought to disavow or recast in the American system. *See* P. HOFFER & N. HULL, *supra* note 14, at 97; Gerhardt, *supra* note 6, at 16-17, 23 & n. 116. Building upon a base of English precedent, the framers undeniably effected an "Americanization of impeachment—fitting it to American needs, making it republican, defining its limits, [and] experimenting with constitutional formulations." P. HOFFER & N. HULL, *supra* note 14, at xiii. Yet, the existence of this precedent, and the absence of any affirmative rejection of it by the American framers, effectively refutes the suggestion that the use of committees in impeachment trials would have been alien or repulsive to those who designed the Constitution. As Professor Williams has concluded:

> At the very least, the lack of recorded controversy over impeachment procedures—in contrast to the belabored debates over the substantive law of impeachment and its place in the American constitutional scheme—suggests that the framers did not feel any need to depart sharply from English procedural prac-

> tice, even though they deviated from the English impeachment model in other respects.

Williams, *supra*, at 520 (footnote omitted); *see also id.* at 537-38, 543-44.

I conclude that the practice of using special impeachment committees to collect evidence in advance of final consideration by the full Senate can be accommodated within the parameters of the Constitution's text and the other historical indicia of the framers' intent. It cannot be said, given the history of English impeachment practice and the framers' own statements, that the framers intended to *require* that the receipt of evidence and the examination of witnesses in impeachment trials always take place in their entirety before the full Senate. Consequently, I would find that the Senate's limited use of an evidentiary committee in connection with Nixon's case did not deprive him of the sort of "trial" to which he was constitutionally entitled.

Nixon objects that the deliberations by the full Senate in his case, based as they were on final arguments by the parties and the committee's report on the evidence, cannot be considered a "trial" in the sense that Americans have always understood that word.[19] This is all the

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[19] Nixon also argues that the Senate's use of a 12-member evidentiary committee effectively defeats one of the framers' reasons for choosing the Senate over the Supreme Court as the most appropriate forum for impeachment trials. Nixon points out that the framers preferred the Senate as a court of impeachment over the Supreme Court in part because the Senate, then comprised of 26 members, was larger. *See* THE FEDERALIST No. 65, *supra*, at 441-42. The framers believed that placing the power to remove high federal officials in the more "numerous" Senate would help to ensure the independence and integrity of the decisionmaking. *See id.*; Notes of James Madison (Sept. 8, 1787) ("Mr. Govr Morris thought no other tribunal than the Senate could be trusted [with the task of trying impeachments]. The Supreme Court were too few in number and might be warped or corrupted."), *reprinted in* II M. FARRAND, *supra* note 14, at 551. Yet, it is far from clear what this

more true, Nixon contends, because credibility determinations were crucial to the ultimate assessment of his guilt or innocence and yet 88 of 100 senators did not see the witnesses testify in person and thus had no opportunity to draw their own inferences about the witnesses' veracity.

If Nixon's were an ordinary criminal trial, I would readily agree. But, as already noted, history makes clear that the framers never intended impeachment trials to mirror criminal trials; nor was it ever supposed that the Senate would be transformed into an Article III court when it took up the task of trying an impeachment. By the framers' design, "impeachment hearings were not trials in which the senators were jurors, despite the fact that they sat upon oath or affirmation, so much as deliberative sessions, when they decided whether an official had betrayed his public trust." P. HOFFER & N. HULL, *supra* note 14, at 106; *accord* Williams, *supra*, at 576-77. Thus, what the Constitution requires of the Senate in conducting impeachment trials is not rigid adherence to criminal procedure but a solemn attention to fairness guided by whatever procedures the Senate reasonably finds fitted to that end. Simply put, the fact that the framers "designed a deliberately cumbersome removal mechanism," *see* Edwards, *supra* note 14, at 767, does not mean that the Constitution must be interpreted to command the *most cumbersome* procedures imaginable.

The notion that senators might make credibility determinations without having scrutinized the witnesses in person is not, contrary to Nixon's assertions, alien to accepted standards of procedural fairness in this country. Administrative tribunals, for instance, are thought fit

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should suggest about the constitutionality of the Senate's use of an evidentiary committee in Nixon's case. Whatever the committee's role in *gathering evidence*, the final deliberations and decisionmaking concerning Nixon's guilt *were* conducted by the full Senate, fulfilling the framers' intention that conviction or acquittal be decided by a more "numerous" body.

to make decisions, including judgments on credibility, based on a record compiled elsewhere by a hearing examiner and that these judgments may be upheld even though contrary to those reached by the examiner who actually heard the witnesses testify. *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494-96, 71 S.Ct. 456, 467-69, 95 L.Ed. 456 (1951) (examiner's factual findings, particularly as to witness credibility, are probative and entitled to weight, but Board may reach contrary conclusions). *See generally* Williams, *supra*, at 590-606. I do not mean, of course, to equate the Senate's role in trying an impeachment with an agency's in conducting an adjudication; the Senate's responsibility is often far more grave and the implications of its decision far more significant in the life of the nation. At the same time, the experience of these tribunals establishes that, while Nixon's notion of a "trial" is one that is recognized as the appropriate model for an Article III court, it is not the exclusive notion of a fair trial. Given that the Senate is not an Article III court, and is not expected to become one for purposes of trying impeachments, there is no reason to bind it to every procedure thought apt in a traditional judicial forum. *See* Gerhardt, *supra* note 6, at 94 (examining the Senate's use of evidentary committees in the Nixon and Hastings impeachment trials and concluding that "[t]here is little doubt such a procedure is constitutional"); Williams, *supra*, at 619-20.

This conclusion seems especially clear in light of the concession by Nixon's counsel at oral argument that the Constitution does not require the attendance of all senators, or even most senators, at an impeachment "trial." The Senate could constitutionally "try" Nixon even with fewer than 12 senators present, Nixon's counsel argued, so long as it was done on the Senate floor.[20] But the con-

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[20] As I have already suggested, history has shown that this hypothetical is not entirely outlandish.

stitutional significance of the difference between that scenario and the sort of evidentiary proceeding provided Nixon eludes me. To the contrary, I believe that the procedure employed by the Senate in this case—a prolonged evidentiary hearing before a special committee followed by review, argument and deliberation by the full Senate—is far better calculated to achieve the ends intended by the framers, *i.e.*, that the ultimate decision be grounded in evidence rather than partisan passion, that it be arrived at by a "numerous" body and that the fact-finding upon which it is based be conducted with a solemn attention to fairness such as would command the respect and adherence of a potentially divided nation.

Consequently, I would find that the Senate acted within the bounds of its constitutional authority when it convicted Nixon based partly on evidence gathered by a special impeachment trial committee.

III. Conclusion

For the foregoing reasons, I would find that Nixon has presented a justiciable controversy. On the merits, however, I would find that the Senate did in fact "try" Nixon within the meaning of the Constitution and that Nixon was therefore constitutionally deprived of his office. I would affirm the judgment of the District Court on these grounds.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 89-3154-LFO

WALTER L. NIXON, JR.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

Aug. 10, 1990

MEMORANDUM

OBERDORFER, District Judge.

Walter L. Nixon, Jr., was a United States District Judge for the Southern District of Mississippi until removed from office on November 3, 1989, as a result of a conviction by the United States Senate on two of three Articles of Impeachment previously adopted by the House of Representatives. The impeachment derived from Nixon's 1986 conviction on two counts of making false statements to a Grand Jury with respect to an investigation of charges that he had accepted gratuities and interfered with prosecution on drug charges of the son of a business associate.

Nixon sues the United States, James A. Baker, III, Secretary of the State, and Ralph Mecham, Director of the Administrative Office of the United States Court for a declaration that the conviction voted by the Senate on the impeachment charges is void. His theory on the merits

derives from the terms of the U.S. Const. Art. I, § 2, cl. 5 which vests in the Senate "the sole Power to try all Impeachments." He contends that this language requires the Senate as a body to "try" an impeachment on the floor of the Senate so that all Senators can, if present, see the witnesses, hear their testimony, and thereby effectively appraise their credibility. He complains that in this case, despite his requests for trial before the "full" Senate, the Senate, as such, did not see witnesses and hear their testimony. Instead, operating pursuant to Rule XI, Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, adopted in 1936 but employed for the first time in 1986 and 1989 for the impeachment trials of Judges Harry Claiborne and Alcee Hastings, the Senate appointed a committee of twelve Senators. Only the committee members viewed the evidence and took the testimony of witnesses. Therefore, plaintiff claims, in essence, that Rule XI and his conviction violate the literal requirement of Article I that only "the Senate" is authorized to "try" an impeachment and take testimony of witnesses.

I.

Rule XI provides in relevant part:

> That in the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony. . . .
>
> . . . The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes . . . as having been received and taken before the Senate. . . .

A Senate Resolution, adopted pursuant to Rule XI, appointed a Committee of twelve Senators to hold an evi-

dentiary hearing, to submit to the Senate "a certified copy of the transcript of the proceedings before the committee and testimony had and given before it," and to "report to the Senate a statement of facts and a summary . . . of evidence that the parties have introduced on the contested issues of fact."

The committee took testimony over four days. The House managers called four witnesses. Six witnesses, including the plaintiff, testified in his defense. The hearings were broadcast live to all Senate offices and videotaped for future reference by Senators. The record is silent as to how many Senators took advantage of these opportunities to view the committee proceedings. The committee was not authorized to, and did not, vote on guilt or innocence and made no recommendation. Its report, filed on October 16, 1989, did however note that:

> Many specific details—including some that are very important—about each of these conversations are disputed by the parties. Indeed, the committee received dramatically inconsistent testimony concerning the substance, date, and result of these conversations from the participants in the conversations themselves —Judge Nixon, Wiley Fairchild, and Bud Holmes— as well as from a fourth witness, . . . Familiarity with these witnesses' various, and divergent, testimony concerning these three conversations is critical to obtaining an understanding of the parties' respective positions. . . .

Report of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., S.Doc.No. 164, 101st Cong., 1st Sess., at 18-19 (1989).

During the course of the proceedings, plaintiff filed a motion before the committee for a trial before the full Senate based on the provision of Rule XI that:

> [N]othing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate. . . .

The committee denied that motion on July 25, 1989. Following the filing of the Committee's Report on October 16, 1989, plaintiff filed a brief in the full Senate on October 24, 1989 which included a footnote renewing the motion for a trial before the open Senate. The note and a significant portion of the brief emphasized the importance of credibility issues to the case; the brief further asserted that the omission from the Report of several passages of plaintiff's own testimony was misleading and inaccurate. In any event, no witnesses appeared before the full Senate hearing. However, plaintiff himself made part of the oral argument on his own behalf. Before the Senate voted on the merits of the impeachment, it voted 90 to 7 to deny plaintiff's renewed motion for a trial before the Senate.

Meanwhile, in June 1989, plaintiff intervened in an action brought by Judge Hastings before Judge Gerhard Gesell of this Court. Judge Hastings had been the defendant in a criminal trial which ended in his acquittal. He was nevertheless the subject of impeachment proceedings in which only a Rule XI Committee of the Senate heard testimony. Judge Hastings' case in this Court raised, among other things, the constitutional issue pressed by plaintiff here that he was entitled to an evidentiary hearing before the Senate. On July 5, 1989, Judge Gesell dismissed plaintiff's claim on the ground generally that the Senate's decision to proceed as it did was within its unreviewable prerogative in the absence of some clear constitutional violation. *Hastings v. United States Senate*, 716 F.Supp. 38 (D.D.C.1989). On October 18, 1989, the Court of Appeals affirmed the dismissal on the ground that the plaintiff's challenge to the Senate proceedings was premature. *Hastings v. United States Senate*, 887 F.2d 332 (D.C.Cir.1989).

II.

Plaintiff argues that the procedure used to impeach him was fundamentally unfair. He asserts that the issues in his trial were dependent, indeed turned, on witness credibility, particularly as one of the key witnesses against him recanted earlier testimony in the trial in federal court but recanted the recantation in testimony before the Senate Committee and another key witness, testifying before the Senate Committee, repudiated a prior sworn affidavit and deposition testimony. To demonstrate that he does not rely on a mere technicality but on a functional difference between hearing testimony firsthand and relying on the Committee's Report, plaintiff has submitted tabulations showing that in the final vote before the full Senate a substantially greater percentage of the Committee members voted to acquit him than did Senators who were not Committee members and did not see and hear witnesses. Furthermore, he submits such figures for the impeachment trials of former Judges Claiborne and Hastings, the only other impeachment trials in which the Senate appointed a committee of twelve senators pursuant to Rule XI, that also show a substantially greater percentage of committee members voting to acquit than non-committee members. Plaintiff notes that one of the two counts on which he was convicted and all of the eight counts on which former Judge Hastings was convicted failed to receive a two thirds majority of committee members and thus might not have received such a majority in the full Senate had all of the Senators heard the evidence directly. This showing lends support to plaintiff's claim of unfairness. However, it leaves a difficult question, discussed below, as to whether the unfairness constitutes a constitutional violation cognizable by a federal court under existing precedent.

III.

A.

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action " 'will be sustained if the Constitution . . . is given one construction and will be defeated if [it is] given another.' " *Powell v. McCormack*, 395 U.S. 486, 514, 89 S.Ct. 1944, 1960, 23 L.Ed.2d 491 (1969) (quoting *Bell v. Hood*, 327 U.S. 678, 685, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946)). The availability of the judicial remedy sought by plaintiff depends, therefore, on whether the controversy here is justiciable.

B.

Decision on both justiciability and, if reached, the merits of the constitutional arguments turns on the literal, contextual, and historic meaning of the word "try" as it appears in Article II, § 3, cl. 7. Some clues to the meaning of that word appear in the Constitution itself.

Article I, § 2, cl. 5 vests in the House of Representatives "the sole Power of Impeachment." That provision is quite separate and apart from Article I, § 3, cl. 6 which provides in language characteristic of criminal trials in court before a jury that:

> The Senate shall have the sole Power to *try* all Impeachments. . . . When the President of the United States is *tried*, the Chief Justice shall preside: And no Person shall be *convicted* without the Concurrence of two thirds of the Members present.
>
> *Judgment* in *Cases* of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party *convicted* shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law. [Emphasis added.]

Article III, § 2, cl. 3, highly relevant contextually for its juxtaposition of trial by jury and trials in cases of impeachment, provides:

> The *Trial* of *all Crimes, except* in *Cases of Impeachment*; shall be by jury; and such *Trial* shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. [Emphasis added.]

Finally, and significantly, the Seventh Amendment focuses on the words "fact" and "tried" in its provision that:

> In Suits at common law . . . no *fact tried* by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. [Emphasis added.]

There are thus strong contextual indications that if the Framers could speak today, they might well say that they intended impeachments to be tried to the Senate, sitting as a court on questions of law and as jurors on questions of fact.

Moreover, historical sources indicate that the Framers established impeachment by trial in the then 26 person Senate rather than a less numerous and arguably more efficient tribunal in order to make removal substantially difficult. According to *The Federalist No. 65* 436 (A. Hamilton) (P. Ford, ed. 1898), "[t]he hazard [of impeachment in a tribunal insufficiently dignified or independent] could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy." Accordingly, the Framers deliberately chose a numerous body to try impeachments, e.g. the 26 person Senate, instead of the less numerous Supreme Court, because, among other considerations, "the Supreme Court were too few in number." *See*

2 M. Farrand, *The Records of the Federal Convention of 1787*, at 551-53 (Aug. 7, 1787) (rev. ed. 1966). The Framers also rejected the British method of removal of judges "by address," which required only a majority vote in Parliament, in favor of requiring a trial and a two thirds majority out of concern that the British method would inappropriately weaken the independence of judges. *See* 2 *Farrand, supra* at 428-29; Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 S.Ct.Rev. 135, 150-51. These concerns provide evidence of the Framers' determination that the procedure finally chosen—trial in the Senate with two thirds majority to convict—while more cumbersome than some alternatives, was essential to the preservation of judicial integrity.

Aside from textual and historical indicators, there is in addition a striking analogy between the duty of a federal judge sitting as a trier of fact to expose himself directly to the evidence and the duty of Senators sitting like jurors as triers of fact in an impeachment case. There are significant differences between the consideration given to a matter by triers of fact who confront live witnesses and those who view the testimony second hand in a transcript or from oral or video tape. This difference is reflected in the Seventh Amendment's limitation on trial and appellate court review or re-examination of a "fact tried by a jury." There are also limitations on the authority of a judge sitting as a trier of fact without a jury to refer a complex or unwieldy case to a special master. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1954). A judge sitting as trier of fact may appoint a special master to take evidence and make recommendations to the court "only upon a showing that some exceptional condition requires it." Fed.R.Civ.P. 53(b). The Supreme Court in *La Buy* rejected considerations such as congestion, complexity, and length of trial time as exceptional conditions permitting appointment of a special master.

The Sixth Circuit has similarly found conditions of extraordinary pretrial management and public interest in speedy resolution to be insufficiently exceptional to warrant referral. *In re United States*, 816 F.2d 1083, 1088 (6th Cir.1987). Indeed, courts have noted: "it is difficult to conceive of a reference of a nonjury case that will meet the rigid standards of *La Buy*." *Liptak v. United States*, 748 F.2d 1254, 1257 (8th Cir.1984) (citing 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2605 at 791 (1971)); *see also In re Armco, Inc.*, 770 F.2d 103, 105 (8th Cir.1985). *But see In re Department of Defense*, 848 F.2d 232 (D.C.Cir.1988) (upholding appointment of special master to review documents in FOIA case with issues of national security). The same considerations which limit the authority of courts to reexamine facts tried by a jury and limit a federal judge's authority to refer the taking of evidence and making of recommendations to a special master may apply to the Senate's prerogative to filter through a committee the testimony offered in evidence in an impeachment proceeding.

C.

Despite textual and historical indicators that the word "try" carries with it some duty for Senators to sit as judge and jury, and appealing as plaintiff's functional argument may be, plaintiff has not established the kind of clear violation of a specific constitutional requirement which would trigger judicial authority to review a solemn and serious Senate action. Even though plaintiff's challenge to the constitutionality of Rule XI raises a serious question not yet addressed at the appellate level, it must nonetheless fail because his claim is not justiciable.

The issue on justiciability turns ultimately on the narrow question of whether the Senate's specific denial of this plaintiff's motions for leave to take testimony before the open Senate denied him the kind of trial clearly guaranteed to him by the Constitution. On this issue

defendant and *amicus* point with emphasis to the provisions of Article 1, § 3, cl. 6 that the Senate has the *sole* power to try impeachments and of Article I, § 5, cl. 2 that "Each House may determine the Rules of its Proceedings." Decision on the justiciability of this controversy about this particular motion and the denial of it is governed by principles announced by the Supreme Court in *Powell*, and more recently addressed by Judge Gesell in respect to plaintiff and Judge Hastings. *Hastings v. United States Senate*, *supra*. In the case before the Court in *Powell*, the House had excluded a re-elected Congressman. The Court reviewed and voided the House decision excluding the Congressman because its actions exceeded *explicit* textual limitations on its powers. It was undisputed that the Congressman met the explicit constitutional qualifications established by Article 1, § 2, cl. 2: age, years of citizenship and inhabitancy of the state represented. The Court drew a line between judicial authority to review a decision excluding a person where possession of one of those qualifications was a matter in dispute and resolved by the House, and where, as in *Powell*, the House excluded a person despite his or her undisputed possession of the specific qualifications. Thus, in *Powell*, the Supreme Court found that the House had attempted "to set qualifications for membership" beyond the several specified in the Constitution. *See Powell v. McCormack*, 395 U.S. at 520; 89 S.Ct. at 1963.

The denial of plaintiff's motion for a hearing before the full Senate plainly diminished the Senate's ability to appraise conflicting testimony and permitted Senators to exercise their authority to try plaintiff differently from the way judges and juries try facts. But the denial was not the kind of constitutional violation that the Supreme Court found to be justiciable in *Powell v. McCormack*. The denial more nearly resembled a procedural ruling pursuant to the Senate's rule making authority created by Article I, § 5, cl. 2, as to the *type* of trial to be accorded this particular plaintiff, the sort of decision

the Court of Claims has determined to be committed solely to the Senate. *See Ritter v. United States*, 84 Ct.Cl. 293, 296, *cert. denied*, 300 U.S. 668, 57 S.Ct. 513, 81 L.Ed. 875 (1937); *see also Powell v. McCormack*, 395 U.S. at 521 n. 42, 89 S.Ct. at 1963 n. 42. As Judge Gesell succinctly put it, the impeachment clause of the Constitution simply "does not say that the *full* Senate must try all impeachments." *Hastings v. United States Senate*, 716 F.Supp. at 40 (emphasis in original).

As the Senate as *amicus curiae* persuasively explains here, the instant controversy might be justiciable and plaintiff might be entitled to the relief he seeks if he had not been impeached by the House, were not a civil officer of the United States, or if the Senate had attempted to impose a sanction beyond removal from office and disqualification from holding office in the future. He might well also prevail if he were convicted without any semblance of a trial. However, in light of the Senate's constitutionally granted rule making power, the authorities now available, and the deference due to the views of respected colleagues, it is difficult to conclude that the Senate's denial of plaintiff's motion for a hearing before the full Senate, while according him an opportunity to present and cross-examine witnesses before the Committee and the opportunity to argue both personally and by counsel before the full Senate, resulted in the dimension of departure from the Constitution's textual commitment to the Senate of the "sole Power to try all Impeachments" as to make this controversy justiciable and the claim meritorious.

In view of the foregoing, an accompanying Order will grant defendants' motion to dismiss this case as non-justiciable.

ORDER

For the reasons stated in the accompanying Memorandum, it is this 10th day of August, 1990, hereby

ORDERED: that defendants' Motion to Dismiss should be, and is, hereby GRANTED; and it is further

ORDERED: that plaintiff's Motion for Summary Judgment should be, and is, hereby DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 89-1602

ALCEE L. HASTINGS,
Plaintiff,

WALTER L. NIXON, JR.,
Intervening Plaintiff,

v.

UNITED STATES SENATE, the IMPEACHMENT TRIAL COMMITTEE, Established Pursuant to Senate Resolution 38, WALTER J. STEWART, Secretary of the United States Senate, and JOSEPH E. JENIFER, as Acting Public Printer of the United States Government Printing Office,
Defendants.

July 5, 1989

MEMORANDUM

GESELL, District Judge.

At the eleventh hour United States District Judge Alcee L. Hastings seeks by this complaint to stop his impeachment proceedings in the United States Senate which are scheduled to commence July 10, 1989. Judge Hastings contends that the contemplated impeachment hearing is procedurally flawed because a committee is being used as part of the process. This, he contends, will deny him due process because the trial will not be conducted entirely before the full body of the Senate, which he urges is required by Article I, Section 3 of the Constitution. District Judge Walter L. Nixon, Jr. has intervened in support of this primary claim, having demon-

strated that he, too, will face similar impeachment hearings in the Senate later in the fall. As each judge well knows the Senate as an entity cannot be effectively sued. Therefore, judge Hastings also asks that the individual defendants who would normally implement impeachment proceedings be preliminarily enjoined. All defendants have responded by a single motion to dismiss. All motions are elaborately documented and there has been full argument by all parties. The Court has consolidated aspects of the preliminary injunction motion with a hearing on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure.

Judge Hastings' complaint also advances other claims. He contends that the Senate is violating his 5th Amendment double jeopardy rights, because a jury previously acquitted him of some charges the Senate will be considering. He urges that he is being denied effective assistance of counsel and that the Senate has unconstitutionally diminished his pay because it has not provided attorney's fees for his defense. He also seeks to block the committee's efforts to receive a stipulation of uncontested facts and documents. All these claims boil down to what is essentially a charge that the Senate is violating his due process rights to a fair trial by trying him in the first place and by subjecting him to the committee process in the second.

The Court has jurisdiction to hear at least the constitutional aspects of Judge Hastings' complaint under its general federal question jurisdiction, 28 U.S.C. § 1331. Rule XI:

Judge Hastings' impeachment proceedings are governed by Rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, which the Senate adopted in 1935. The Senate passed implementing rules by Resolution for this specific trial, acting on recommendations from the Rules Committee, which considered various fair trial aspects of the case. Impeachment

Rule XI authorizes the appointment of a Senate Committee "to receive evidence and take testimony" and to "report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee." S.Doc. No. 101-3, 101st Cong., 1st Sess. 15 (1989). The report issued by the committee to the Senate will not make conclusions or recommendations to convict or acquit on each Article, but will be more in the nature of a neutral summary. The Rules Committee recommendations provide that the entire committee hearing will be taped. It will be broadcast to each Senator's office. Senators may replay the tape at any time for any purpose such as to evaluate the demeanor of witnesses whose credibility may be placed in issue. S.Rep. No. 101-1, 101st Cong., 1st Sess. 112 (1989). The Senate trial is scheduled so as to give Senators not on the committee approximately one month to read the report and review any tapes or evidence they wish to consult before taking the requisite oaths and voting on impeachment.

The Committee format has not prevented full participation by the Senate. The Senate as a whole fully heard Judge Hastings' motions to dismiss. 135 Cong.Rec. S2550-64 (daily ed. Mar. 15, 1989), *Id.*, S.2802-04 (daily ed. Mar. 16, 1989). Moreover, Rule XI specifically reserves to the Senate as a whole the right to hear directly the testimony of any or all witnesses it desires at any time prior to the impeachment vote.

Insofar as Judges Hastings and Nixon contend that they each have an individual right to an impeachment tried before the full Senate and that a federal district court may supervise the Senate's procedures for impeachment, they are mistaken. Article I, Section 3 provides that "The Senate shall have the sole power to try all impeachments," and Section 5 of the same Article states that "each House may determine the Rules of its Proceedings." It is crystal clear that impeachment proceedings are wholly committed to Congress under the Consti-

tution. Thus a classic political question is presented under *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). Absent evidence that the Senate is violating the Constitution, the Court should stay its hand.

The use of a committee to develop facts is not a new idea. This was the practice of the House of Lords in the early part of the 17th Century, and the possibility of using a committee in the process was first proposed in the Senate as early as 1904. Thereafter, the committee approach was debated from time to time. Some urged use of a committee because as few as three Senators had been present during impeachment trials before the full body, which proceeded even in the absence of a quorum. In recent years Senators have relied heavily on written materials developed in their absence when an impeachment matter came to a vote. The committee procedure was used in 1986 for the impeachment of Judge Claiborne and, with some modification of procedures in light of that experience, it has been reinvoked. S.Rep. No. 101-1, 101st Cong., 1st Sess. 9-15, 110-115 (1989); S.Rep. No. 100-542, 100th Cong., 2d Sess. 113-114 (1988).

It is not this Court's function to tinker with the Senate's procedures or to anticipate problems that could arise. The procedures adopted do not by their terms violate any constitutional rights or offend fundamental notions of justice.

The Senate's interpretation of what type of trial Article I, Section 3 requires is entitled to deference, absent a clear Constitutional violation. Judge Hastings through his able counsel argued forcefully before the Senate his conception of what a trial required, and the Senate rejected it.[1] The Constitution simply does not specify in

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[1] *See, e.g., Memorandum on Behalf of United States District Judge Alcee L. Hastings Concerning the Use of a Rule XI Senate Trial Committee to Receive Evidence in this Case*, Sept. 6, 1988, Def. Appendix p. 21; *Impeachment Trial Procedures: Hearing before the Committee on Rules and Administration*, 101st Cong., 1st Sess., S.Hrg. 101-3 (1989); S.Rep. No. 100-542, 100th Cong. 2d Sess. 1988);

detail what is required for the trial before the Senate beyond: 1) an oath or affirmation 2) a two-thirds vote 3) the possible punishment or remedy and 4) who presides when the President is tried. The Constitution does not say that the *full* Senate must try all impeachments, nor does the verb "try" necessitate granting the accused all the requirements of modern criminal due process as the complaining judges suggest. In fact, at the time the Constitution was drafted, definitions of "try" included "to sit in judgment" and "to examine (a person) for the purpose of testing his qualifications."[2] Of course, persons and bodies may sit in judgment without having received evidence in the manner Aritcle III courts try criminal charges.

The relief sought by plaintiff and intervenor would be utterly foreign to our system of divided powers. As Chief Justice Marshall stated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421, 4 L.Ed. 579 (1819):

> [T]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

Courts in this District have regularly rejected other petitions seeking judicial supervision of Congressional proceedings;[3] a court found that the Senate was the sole

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Cong.Rec. S2803-04 (daily ed. March 16, 1988), adopting S.Res. 38, providing for the appointment of a committee to receive evidence with respect to Judge Hastings.

[2] Oxford English Dictionary, 2d ed., Vol. XVIII at 630. Other now-obsolete meanings included: to separate (one thing) from another or others; to set apart; to take or get out, to extract; to ascertain, find out (somethoing doubtful, obscure, or secret) by search or examination; to sift out. Quotations exemplifying many of these definitions are indicated as having legal meanings.

[3] *Claiborne v. United States Senate*, C.A. No. 86-2780 (D.D.C. 1986), Hearing on Motion for Temporary Restraining Order, Oc-

tribunal for Judge Ritter's impeachment proceedings in the 1930's when he sought judicial review,[4] and the Court today likewise refuses to second-guess the Senate's impeachment proceedings.

Double Jeopardy:

Judge Hastings nonetheless contends that his impeachment is primarily a second trial of the same criminal charges which resulted in his acquittal after jury trial. While many but by no means all of the Articles of Impeachment concern aspects of his felony trial, his position is again premised on a fundamental misapprehension. Because he believes he is entitled to the process owed an accused criminal, he urges that principles of double jeopardy should apply, but impeachment is not a criminal proceeding.

Impeachment trials are sui generis: in several instances in the Constitution, impeachment is distinguished from criminal proceedings. The accused has no right to a jury, and the President may not pardon a person convicted by impeachment. The Framers understood that impeachment trials were fundamentally political, which seems to indicate that impartiality—however much it has been present and is to be desired—is not guaranteed. It is clear that the federal rules of evidence do not apply in impeachment trials, and the Constitution itself does not require unanimity among the Senators sitting in judgment. Senators determine their own burdens of proof: they need not be persuaded beyond a reasonable doubt that the defendant committed each and every element of every Article. Deviating from English precedent, the Framers sharply limited the remedies or pun-

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tober 8, 1986, at 4; *Williams v. Bush*, C.A. No. 81-2839 (D.D.C. 1981), Hearing on Motion for Temporary Restraining Order, Nov. 27, 1981, at 23; Memorandum, February 3, 1982.

[4] *Ritter v. United States*, 84 Ct.Cl. 293, 296 (1936), *cert. denied*, 300 U.S. 668, 57 S.Ct. 513, 81 L.Ed. 875 (1937).

ishment available upon conviction to disqualification and removal from office, and when the Constitution speaks of Article III judges, it states, as the certificate of every federal judge repeats, that he or she serves subject to good behavior. While some process is clearly due, rights are not necessarily compromised by varying from the rights and process accorded defendants in criminal proceedings. At trial the Senators themselves may again weigh if they see fit Judge Hastings' claims that he has been wrongly tried because of his earlier acquittal.[5]

Judge Hastings suggests that Article I, Section 3, which states that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law" by implication bars impeachment following an acquittal. The more natural meaning of the Constitution is that it acknowledges separate and different roles for the executive's power of prosecution and the legislature's imeachment powers. It is unthinkable that the executive branch could effectively prevent an impeachment by purporting to try a judge or that the judiciary could prevent an impeachment by accepting a plea. Rather, the executive and legislative branches have different roles to play if a judge engages in criminal behavior. Moreover, Judge Hastings faces Articles of Impeachment charging false testimony, fabrication of false records and grossly improper disclosure of confidential law enforcement information, for which he was not previously tried. Impeachment proceedings are not to be restricted by principles of double jeopardy any more than a conviction always necessitates impeachment.

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[5] Senator Specter voted to deny Judge Hastings' motion to dismiss, but inserted a thoughtful essay on developments in double jeopardy law into the Congressional Record, stating that after all the evidence is in, the Senate would revisit and more fully consider Judge Hastings' claims going to the fundamental fairness of the proceedings. 135 Cong.Rec. S.2804 (daily ed. March 16, 1989).

Trial Expenses:

The Court must also reject Judge Hastings' ineffective assistance of counsel and diminution of pay arguments. No substantive statute provides for attorney fees for judges or any other official in impeachment proceedings. While the burdens of legal defense can of course be heavy, the Senate alone determines procedures in this regard as in other matters raised in the complaint. The Senate will be paying the expenses of necessary witnesses for Judge Hastings. As yet, it is uncertain whether the Senate would pay Judge Hastings' fees if he is acquitted. It has not apparently paid expenses up front in the past and it is not subjecting Judge Hastings to special treatment different from that used in prior impeachments. The situation presented does not violate Article III, Section 1.

Speech and Debate Clause:

The complaints also raise troubling Speech and Debate clause issues. Article I, Section 6 provides that Senators and Representatives' speech or debate shall not be questioned in any other place. The Supreme Court has construed this clause broadly, and this Court must accordingly protect the legitimate activities of Senators acting within their constitutionally prescribed functions, including legislation and impeachment. *See, United States v. Johnson*, 383 U.S. 169, 180, 86 S.Ct. 749, 755, 15 L.Ed.2d 681 (1966); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975); *Gravel v. United States*, 408 U.S. 606, 625, 92 S.Ct. 2614, 2627, 33 L.Ed.2d 583 (1972); *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1446 (11th Cir.1987). Judge Hastings has sought to obviate the clear requirements of the Constitution by naming the Secretary of the Senate and the Acting Public Printer. However, their functions in this matter are to assist the Senators in conducting the hearings and disseminating the transcripts and committee report to Senators not on the committee. For the purposes of this action, their internal functions are fully protected by the Speech and

Debate Clause. Even if the Court were to enjoin these persons, the Senate could simply designate one of its own members to fulfill their ministerial functions. Any order issued by the Court restraining the functions of these defendants not protected by the Speech and Debate Clause would have no effect.

Conclusion:

During the argument, counsel for Judge Hastings made subtle suggestions to the Court that there was some special need to protect Article III judges from the Senate's impeachment power because the independence of the judiciary might be compromised. This was an ill-advised argument. Given the size of the federal judiciary, surely an occasional judge will violate his or her duty and it strengthens rather than lessens the independent judiciary if such behavior is decisively identified and the offending judge removed. The Senate has been tolerant in such matters, cautious and careful, for it recognizes the need to move only where the conduct of a judge under scrutiny compels action. To now suggest that Article III judges should have a preference not mentioned in the Constitution illustrates the mistaken notion that the judiciary is above normal constitutional standards. As is the case with officials of any branch of government, judges gain respect through their own actions, not by receiving preferential treatment when misconduct occurs.

There is no possibility of success on the merits, all equities favor the Senate, and the public interest will be served by permitting the impeachment trial of Judge Hastings to proceed as contemplated by the Senate. Due to the political question raised, for prudential reasons, and in recognition of the Speech and Debate Clause, the Court finds the case non-justiciable and it declines to become involved in monitoring the Senate's constitutionally-assigned proceedings.

The complaints are dismissed. An appropriate Order is filed herewith.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5188

HONORABLE ALCEE L. HASTINGS,
Appellant

v.

UNITED STATES SENATE, *et al.*

No. 89-5191

WALTER L. NIXON, JR.,
Appellant

v.

UNITED STATES SENATE, *et al.*

Appeal from the United States District Court
for the District of Columbia

Before: Ruth B. Ginsburg, Silberman and Sentelle,
Circuit Judges.

MEMORANDUM

[Filed Oct. 18, 1989]

Appellants' claims are premature. They tender issues *sub judice* in proceedings currently before the United

States Senate, the body charged by the Constitution with authority over those issues. *See* U.S. Const. art. I., § 3, cl. 6. They seek immediate and definitive judicial resolution of those issues despite the contingent nature of most of their injuries while the matter remains before the Senate.

This circuit, like its sisters, follows the basic rule that a federal court should not hinder or encroach upon an action concerning the same issues pending in a coordinate federal court. "Considerations of comity and orderly administration of justice dictate that two courts of equal authority should not hear the same case simultaneously" absent extraordinary circumstances. *See Washington Metro. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980); *Bergh v. Washington*, 535 F.2d 505, 507 (9th Cir.), *cert. denied*, 429 U.S. 921 (1976); *Brittingham v. Commissioner*, 451 F.2d 315, 318 (5th Cir. 1971); *United States v. American Radiator & Standard Sanitary Corp.*, 388 F.2d 201, 203-04 (3d Cir. 1967), *cert. denied sub nom. Decker v. United States*, 390 U.S. 922 (1968); *Kahn v. Switzer Bros.*, 201 F.2d 55 (6th Cir. 1952). Nor may a federal court enjoin an ongoing state enforcement proceeding absent a showing of irreparable injury both great and immediate. *See Pennzoil v. Texaco*, 481 U.S. 1 (1987); *Younger v. Harris*, 401 U.S. 37 (1971); *Douglas v. Jeannette*, 319 U.S. 157, 164 (1943); *see also* 28 U.S.C. § 2283.

In these cases, in which the Senate sits as the constitutionally-designated court of impeachment, we should be at least as hesitant to interrupt proceedings in progress as we would be to interrupt proceedings underway in a state or coordinate federal court. *Cf. Adams v. Vance*, 570 F.2d 950, 954-56 (D.C. Cir. 1978) ("exceptionally strong showing" required for preliminary injunctive relief that would interfere with "core concerns" of a co-equal federal branch). Indeed, appellants have not identified and we have not found any case in which the judiciary has is-

sued injunctive or declaratory relief intercepting ongoing proceedings of the legislative branch.[1]

Appellants have not shown a threat of great and immediate irreparable harm. In the circumstances presented, we believe it evident that the judges' claims are not ripe for review. Most of their alleged injuries are contingent on future Senate action, which may allow us to pretermit difficult constitutional issues. *See Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). The Senate may revisit its interim decisions before rendering its final judgment on the impeachments. We therefore confront still modifiable rulings on requested procedures and/or attorneys fee payments. And Judge Hastings is in no worse position with regard to his claim of double jeopardy than a defendant in state court who must await a final judgment by the highest court in the state's judicial system before the Supreme Court will review the issue. *See Rankin v. State*, 78 U.S. (11 Wall.) 380 (1871).[2]

We also reject appellants' suggestion at oral argument that we hold this case in abeyance until the Senate renders final judgments in the two impeachments. The preemptive relief sought and denied in the district court would not be the thrust of a renewed complaint. Should appellants be convicted, they will be positioned to reassess, without generating avoidable friction, the content of their complaints, the forum in which to lodge their cases, and the defendants appropriately sued.

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[1] When a court is asked to interfere with a pending proceeding, the same principles govern the propriety of injunctive and declaratory relief. *See* Samuels v. Mackell, 401 U.S. 66, 73 (1971).

[2] Abney v. United States, 431 U.S. 651, 656-62 (1977), is not to the contrary because the principles of comity, informed by separation-of-powers concerns, that animate our decision here are not present in cases of federal appellate court interlocutory review of district court judgments.

We underscore, in conclusion, that we have reached no question going to the merits of appellants' challenges. We rule solely that considerations of ripeness and vital comity concerns, fundamental to our federalist system and the balance of power our Constitution establishes, preclude judicial intervention at this juncture.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5246

WALTER L. NIXON, JR.,
Appellant

v.

UNITED STATES OF AMERICA, *et al.*

Before: EDWARDS, *Circuit Judge.*

ORDER

[Filed Aug. 5, 1991]

Upon consideration of appellant's Petition for Rehearing, which seeks modification of a paragraph in Judge Edwards' opinion, dissenting in part and concurring in the judgment in the above-captioned case, it is

ORDERED that, for the reasons stated in the accompanying Memorandum opinion, the petition for rehearing is denied.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre/rab
CONSTANCE L. DUPRÉ
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5246

WALTER L. NIXON, JR.,
Appellant

v.

UNITED STATES OF AMERICA, *et al.*

Before: EDWARDS, *Circuit Judge.*

MEMORANDUM

[Filed Aug. 5, 1991]

Appellant, Walter L. Nixon, Jr., has submitted a Petition for Rehearing which seeks "a very limited rehearing to correct an apparent error" in Judge Edwards' opinion dissenting in part and concurring in the judgment in this case. Petition for Rehearing at 1. Appellant takes issue with the first two sentences of a paragraph in the opinion, which read as follows:

> This conclusion seems especially clear in light of the concession by Nixon's counsel at oral argument that the Constitution does not require the attendance of all senators, or even most senators, at an impeachment "trial." The Senate could constitutionally "try" Nixon even with fewer than 12 senators present, Nixon's counsel argued, so long as it was done on the Senate floor.

Nixon v. United States, No. 90-5246, slip op. at 36 (D.C. Cir. July 9, 1991) (Edwards, J., dissenting in part and

concurring in the judgment). Nixon maintains that his counsel did not argue or concede that an impeachment trial conducted with only 12 senators present would be constitutional.

The transcript of oral argument on the appeal reveals that Nixon's counsel did not make the argument attributed to him in precisely the words used in the opinion. The description set forth in the opinion is, however, a fair characterization of the position taken by counsel at oral argument. When pressed on the question of whether all Senators would have to be present at an impeachment trial, Nixon's counsel conceded that perfect attendance was not required and argued that the essential requirements were that the trial takep lace on the Senate floor and that there be *some* senators present. *See* Transcript of Oral Argument ("Tr.") at 8-9. In counsel's words,

> If it's in the Senate and there is *attendance of some kind*, I think there will both be no complaint by a litigant, it is not going to be raised, and also there is going to be no basis for this Court to intervene. But if you press to the extreme, to a zero attendance level, where you have a trial as a sham, yes, I do think that will be an unconstitutional impeachment.

Tr. at 10 (emphasis added).

Although Nixon's counsel never stated explicitly that attendance by less than 12 senators would be constitutional, that conclusion is a fair interpretation of his position. As the opinion notes, counsel's constitutional argument hinged on the alleged requirement that the trial be held on the Senate floor and not on the number of senators present, so long as that number was above "a zero attendance level," Tr. at 10.

The petition for rehearing is denied.

APPENDIX G

UNITED STATES CONSTITUTION

Article I, Section 2, Clause 2

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Article I, Section 3, Clause 6

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the members present.

Article I, Section 5, Clause 1

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Article I, Section 5, Clause 2

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Article III, Section 2, Clause 3

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in

the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Senate Impeachment Rule XI

[I]n the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materi-

ality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

APPENDIX H

Votes for Conviction in the United States Senate on Articles of Impeachment Presented Against Judges Claiborne, Hastings, and Nixon *

* As reported in Imp. Rec., Proceeding at 432-36 (Nixon vote), and the Congressional Record (*see* 135 Cong. Rec. S13782-88 (daily ed. Oct. 20, 1989) (Hastings vote); 131 Cong. Rec. S1576-62 (daily ed. Oct. 9, 1986) (Claiborne vote).

(2)

No. 91-740

Supreme Court, U.S.
FILED
JAN 6 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

WALTER L. NIXON, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS AND AMICUS CURIAE UNITED STATES SENATE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Constitution's commitment to the Senate of "the sole Power to try all Impeachments" renders a complaint about the trial procedures employed by the Senate nonjusticiable.

2. Assuming that this case is justiciable, whether the constitutional assignment to the Senate to "try" all impeachments prevents that body from using a committee to compile an evidentiary record for consideration by the full Senate.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-740

WALTER L. NIXON, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS AND AMICUS CURIAE UNITED STATES SENATE IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-57a, is reported at 938 F.2d 239. The opinion of Judge Edwards denying a petition for rehearing, Pet. App. 84a-85a, is unreported. The opinion of the district court, Pet. App. 58a-69a, is reported at 744 F. Supp. 9.

JURISDICTION

The judgment of the court of appeals was issued on July 9, 1991. A petition for rehearing was denied on August 5, 1991. Pet. App. 83a. The petition for a writ of certiorari was filed on November 4, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 3, Clause 6, of the United States Constitution provides:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

STATEMENT

Petitioner Walter L. Nixon, Jr., a former United States District Judge for the Southern District of Mississippi, brought this action to challenge his conviction by the United States Senate on two articles of impeachment. Petitioner sued the United States, the Secretary of State, and the Director of the Administrative Office of the United States Courts, seeking an order declaring that the Senate impeachment trial rules are invalid and that he remains entitled to full pay and benefits as a district judge. The United States District Court for the District of Columbia dismissed petitioner's challenge as nonjusticiable, Pet. App. 58a-69a, and the court of appeals affirmed, *id.* at 1a-57a.[1]

1. In 1986, petitioner was convicted in federal court on two counts of making false statements before a federal grand jury, in violation of 18 U.S.C. 1623. His criminal conduct is described in the court of appeals deci-

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[1] The United States Senate participated fully in the proceedings below as *amicus curiae* and appears here also in that capacity pursuant to 2 U.S.C. 288e(a), which provides that the Senate may direct its Legal Counsel to appear as *amicus curiae* in its name "in any court of the United States * * * in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permission to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. 288*l*(a). See S. Res. 237, 101st Cong., 2d Sess. (1990); 136 Cong. Rec. S587-S588 (daily ed. Jan. 30, 1990) (directing appearance in this case).

sion affirming that conviction, *United States* v. *Nixon*, 816 F.2d 1022 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988), the district court decision denying his motion for a new trial, *Nixon* v. *United States*, 703 F. Supp. 538 (S.D. Miss. 1988), and the court of appeals decision affirming that ruling. *United States* v. *Nixon*, 881 F.2d 1305 (5th Cir. 1989). Briefly stated, petitioner lied to a grand jury convened to investigate allegations that he had accepted an unlawful gratuity in exchange for his influence in a state criminal prosecution. See also *Report of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.*, S. Rep. No. 164, 101st Cong., 1st Sess. (1989); Br. in Opp. in *Nixon* v. *United States*, No. 87-650, cert. denied, 484 U.S. 1026 (1988).

Following his criminal conviction, petitioner was suspended from the practice of law, *Mississippi State Bar* v. *Nixon*, 494 So.2d 1388 (Miss. 1986), and the Judicial Conference certified to the House of Representatives that impeachment might be warranted. The House investigated the matter, and one of its subcommittees heard seven days of testimony from nine witnesses, including petitioner. See H.R. Rep. No. 36, 101st Cong., 1st Sess. 14-15 (1989). On May 10, 1989, the House impeached petitioner on three articles for high crimes and misdemeanors. See 135 Cong. Rec. H1811 (daily ed. May 10, 1989). Articles I and II charged petitioner with giving false testimony before the grand jury, for which he had been criminally convicted. Article III charged petitioner with bringing disrepute on the federal Judiciary by making numerous false statements to the grand jury and federal investigators. See S. Rep. No. 164, *supra*, at 91-95.

2. The Senate has adopted rules of procedure for conducting impeachment trials. See Senate Manual, S. Doc. No. 1, 101st Cong., 1st Sess. (1989). Senate Impeachment Rule XI states in relevant part:

> [I]n the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall

> appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine * * *.

Id. at 186. Pet. App. 20a n.1. Under that rule, the evidence is received subject to determinations by the full Senate regarding relevance, competence, and materiality. *Ibid.* Rule XI further provides that "nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate." *Ibid.*

When the Members of the Senate received the articles of impeachment of petitioner, they took the constitutionally prescribed oath, Art. I, § 3, Cl. 6, and agreed to Senate Resolution 128, providing for appointment of an Impeachment Trial Committee. The Committee was directed, in accordance with Senate Impeachment Rule XI, to compile and report to the full Senate an evidentiary record concerning the House charges. 135 Cong. Rec. S5199 (daily ed. May 11, 1989).[2]

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[2] In June 1989, before the Committee began taking evidence, petitioner intervened in a pending civil action filed by then-Judge Alcee Hastings in the United States District Court for the District of Columbia, to attack his own impeachment proceedings. Petitioner contended that the appointment of the Committee under Rule XI violated the constitutional provision that the Senate try all impeachments. The district court denied petitioner's motion for a preliminary injunction and dismissed both judges' complaints. *Hastings* v. *United States Senate*, 716 F. Supp. 38 (D.D.C. 1989) (*reprinted at* Pet. App. 70a-78a). The district court held that petitioner's claim was nonjusticiable, stating that "[i]t is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution" and that the relief petitioner sought was "utterly foreign to our system of divided powers." 716 F. Supp. at 40, 41. The court of appeals affirmed the dismissal of the complaints on lack of ripeness grounds, without reaching the justiciability issue. See 887 F.2d 332 (D.C. Cir. 1989) (Table); No. 89-5191 (D.C. Cir. Oct. 18, 1989), slip op. 2 (*reprinted at* Pet. App. 79a-82a).

The Senate Committee heard testimony over four days from ten witnesses, including petitioner.[3] Petitioner's counsel thoroughly cross-examined the witnesses called by the House impeachment managers, but chose to call no witnesses other than petitioner and certain character witnesses. In October 1989, the Committee reported to the Senate a record of its proceedings. As provided by Senate Resolution 128, the Committee also gave "to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact." *Hearings Before the Senate Impeachment Trial Comm.: Report on Articles Against Judge Walter L. Nixon, Jr. (S. Hrg. 247)*, 101st Cong., 1st Sess. Pt. 1, at 4 (1989). In accordance with its instructions, the Committee report made no proposed findings on contested issues of fact and made no recommendations regarding disposition of the impeachment articles. See generally S. Rep. No. 164, *supra*; Pet. App. 20a.

Both petitioner and the House impeachment managers filed extensive briefs on issues of fact and law, which were distributed to all Senators. On November 1, 1989, the full Senate set aside three hours for both sides to present arguments. Petitioner divided his time with his attorney and personally addressed the full Senate for approximately 30 minutes. 135 Cong. Rec. S14,502-S14,504 (daily ed. Nov. 1, 1989). His counsel was given as much additional time as he required to present his points, *id.* at S14,511, an offer that petitioner himself declined. *Id.* at S14,504. At no point during the afternoon of argument did petitioner or his counsel attempt to persuade the Senate to exercise its discretion to send for any particular witnesses to testify before the full Senate. At the end of the arguments, a number of Senators posed questions to the parties or their counsel, and petitioner per-

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[3] The Committee's proceedings were broadcast live to all Senate offices and were videotaped to enable Senators to observe the proceedings at their convenience. Pet. App. 21a.

sonally answered several of them. *Id.* at S14,513-S14,516. See Pet. App. 22a.

The Senate deliberated for six hours in closed session on the impeachment articles. See 135 Cong. Rec. S14,561 (daily ed. Nov. 2, 1989). On November 3, 1989, the Senate voted by the necessary two-thirds majority to convict petitioner on two of the three articles of impeachment. The Senate first denied petitioner's motion for "a full trial before the full Senate" by a vote of 90 to 7. *Id.* at S14,634 (daily ed. Nov. 3, 1989). It then convicted petitioner on impeachment Article I by a vote of 89 to 8 and on Article II by a vote of 78 to 19. On Article III, petitioner was acquitted because only 57 Senators voted to convict—less than the two-thirds majority required for conviction. *Id.* at S14,635-S14,636. See Pet. App. 22a.

3. Petitioner subsequently filed this action alleging that the Senate's trial procedures violate the constitutional provision that the Senate "try" all impeachments. The district court granted respondents' motion to dismiss the complaint as nonjusticiable, concluding that petitioner "has not established the kind of clear violation of a specific constitutional requirement which would trigger judicial authority to review a solemn and serious Senate action." Pet. App. 66a. The court concluded that the "opportunity to present and cross-examine witnesses before the Committee and the opportunity to argue both personally and by counsel before the full Senate" undermined petitioner's claim of a justiciable "departure from the Constitution's textual commitment to the Senate of the 'sole Power to try all Impeachments.' " *Id.* at 68a.

The court of appeals affirmed. In the opinion for the court, Judge Williams concluded that the text of the Constitution, which gives the Senate "the sole Power to try all Impeachments," Art. I, § 3, Cl. 6, commits the impeachment trial process exclusively to that body and renders legal actions challenging the Senate's procedures nonjusticiable. Pet. App. 4a, 8a, 10a. He found that the history of the Constitution's impeachment provisions, as

reflected in the Records of the Convention and the Federalist Papers, further demonstrated that "the framers simply assumed that courts had nothing whatever to do with impeachments." *Id.* at 8a.[4] Judge Williams concluded that the textual commitment of impeachment trials to the Senate, buttressed by that history, justified invocation of the political question doctrine of nonjusticiability. *Id.* at 10a-15a.[5]

Judge Randolph filed a concurring opinion. Pet. App. 16a-18a. Like Judge Williams, he concluded that "the controlling question" is whether "the judiciary can pass upon the validity of the Senate's procedural decisions." *Id.* at 16a, 18a. Judge Randolph reasoned that "[t]he 'sole power to try all Impeachments' must include the sole power to set the procedures for trial, as the Senate did here." *Id.* at 16a. If it were otherwise, "judicial review would lead to judicial control." *Id.* at 17a. Judge Randolph found it unnecessary, however, to invoke the political question doctrine to find petitioner's challenge nonjusticiable, stating: "My conclusion that the courts have no such role to play in the impeachment process ultimately rests on my interpretation of the Constitution." *Id.* at 18a.

Judge Edwards disagreed with the majority's conclusion that petitioner's claim is nonjusticiable, but con-

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[4] Judge Williams explained that the Framers relied on mechanisms other than judicial review—including the division of impeachment powers among the two Houses, the two-thirds majority requirement in the Senate, and the political accountability of members of Congress—to protect the impeachment process from abuse. *Id.* at 8a-9a.

[5] Judge Williams observed that while "textual commitment" provides the "primary reason for invoking the political question doctrine," "the need for finality also demands it." Pet. App. 13a. He explained that the Framers' commitment of final impeachment authority to the Senate, without judicial review, avoided the "chaos" that would result if impeachment proceedings against important government officers were subject to protracted judicial challenges that could undermine the authority of the officers' replacements and "confound matters indefinitely." Pet. App. 14a.

curred in the judgment. Pet. App. 18a-57a. He concluded that the courts "are not only competent, but duty-bound" to determine what procedures the Framers contemplated in stating that the Senate shall "try" an impeachment. *Id.* at 19a. Reaching the merits, he concluded that the Framers of the Constitution intended the Senate to have more procedural flexibility in conducting impeachment proceedings than a court has in a criminal trial and that historical practice confirms that view. *Id.* at 43a-54a. Judge Edwards noted that the validity of the Senate practice attacked here "seems especially clear" in light of the fact that petitioner conceded that he could be tried in the presence of only a small number of Senators, as long as it was done on the Senate floor. *Id.* at 56a-57a.[6]

ARGUMENT

The court of appeals correctly determined that petitioner's challenge to his conviction on articles of impeachment is nonjusticiable. There is no conflict between its decision and any decision of this Court or of any court of appeals. Additionally, as Judge Edwards concluded in his opinion concurring in the judgment, there is no merit to petitioner's underlying claim that the Constitution forbids the Senate from using a committee to compile an evidentiary record for the full Senate to consider in trying the impeachment. Further review is accordingly unwarranted.

1. Petitioner's claim that the Senate violated the Constitution by utilizing a committee to compile an evidentiary record is not justiciable because it asks the courts to review a determination that the Constitution plainly commits to the Senate alone. The Impeachment Trial Clause expressly instructs:

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[6] In a rehearing petition, petitioner's counsel challenged the precise nature of his concession on this point. After consulting the transcript of oral argument in the court of appeals, Judge Edwards denied the petition. Pet. App. 84a-85a.

> The Senate shall have the sole Power to try all Impeachments.

Art. I, § 3, Cl. 6. As the court of appeals explained, that Clause gives the Senate exclusive—and hence unreviewable—power to conduct impeachment trials. Pet. App. 4a, 16a. Accord *Ritter* v. *United States*, 84 Ct. Cl. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937). The Constitution's grant of that authority necessarily gives the Senate sole authority to determine how evidence shall be taken for that body's use—a detail on which the Constitution is silent.[7]

That conclusion finds additional textual support in the Rulemaking Clause, which states that "[e]ach House may determine the Rules of its Proceedings." Art. I, § 5, Cl. 2. As this Court explained in *United States* v. *Ballin*, 144 U.S. 1 (1892), the Rulemaking Clause makes the procedures in each House "absolute and beyond the challenge of any other body or tribunal," so long as they do not "ignore constitutional restraints or violate fundamental rights." *Id.* at 5. Thus, even if the Impeachment Trial Clause did not itself commit the selection of impeachment trial procedures to the Senate, the Senate's adoption and use of Senate Impeachment Rule XI would be beyond judicial review under *Ballin*.[8]

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[7] As Judge Randolph explained:

> Apart from the requirements that the Senators take an oath, that the Chief Justice preside over impeachments of Presidents, and that two thirds of the Senators present must concur, the Constitution is silent about other procedural details. If the Senate did not have the sole power to determine how to conduct the proceedings, if the judiciary had the final say on what procedures the Senate must put in place, it is only a short step to judicial review of the Senate's compliance with those procedures. Once that dike bursts, there can be no holding back the flood of issues that inevitably will be presented to the courts.

Pet. App. 16a.

[8] The use and adoption of Rule XI plainly does not "ignore constitutional constraints." There is nothing in the Constitution that

Additionally, the history of the Impeachment Trial Clause confirms the political nature of the Senate's impeachment function, and, accordingly, the inappropriateness of subjecting the Senate procedures to judicial review. The Framers began with a bifurcated impeachment model, drawn from the English practice of bringing charges against an official in the House of Commons, with trial and judgment by the House of Lords. In the Constitutional Convention, several proposals were presented that impeachments should be tried by a special court or by this Court. See 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 185-186 (1966). After extensive consideration, the Framers decided instead to vest impeachment trial power in the Senate. *Id.* at 39, 46, 493, 552.

The Framers selected the Senate as the appropriate tribunal because impeachable offenses are "of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself," and therefore such trials "will seldom fail to agitate the passions of the whole community." *The Federalist No. 65* (A. Hamilton), at 426 (B. Wright ed. 1966).[9] Significantly, the Framers also selected the Senate rather than a court because they wanted impeachment to be independent of the criminal judicial process, and feared vesting both powers in the

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prohibits the Senate from designating a committee to compile the evidentiary record. Nor does the adoption and use of Rule XI "violate fundamental rights," particularly where the Senate allows the defending party to present and cross-examine witnesses in committee and to appear personally on the Senate floor. See discussion at pages 14-17, *infra*.

[9] Accord 1 J. Story, *Commentaries on the Constitution of the United States* § 746 (5th ed. 1905) ("the power partakes of a political character, as it respects injuries to the society in its political character").

same body. See 2 M. Farrand, *supra*, at 500.[10] Accordingly, although criminal conduct may be grounds for impeachment, a conviction on impeachment is necessary for, and entails only, removal from public office. The removal of an individual from public office is an inherently political action and the procedural issues involved in impeachment are a part of the political process. See Pet. App. 4a-8a.[11]

Not surprisingly, the courts have uniformly held that the type of claim raised by petitioner is nonjusticiable. As the Court of Claims explained in *Ritter* v. *United States*,

> when the provision that the Senate should have "the *sole* power to try all impeachments" was inserted in the Constitution, the word "sole" was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment.

84 Ct. Cl. at 296. See Pet. App. 4a. The result in *Ritter* is consistent with more recent court of appeals decisions finding textual commitment of other constitutional powers to the political branches.[12] In addition, various judges

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[10] See *The Federalist No. 65*, *supra*, at 428 ("by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial"); see also 1 J. Story, *supra*, at § 786.

[11] This is precisely the type of matter that the Framers' contemporary, Chief Justice Marshall, identified in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803), as being beyond the ken of the courts. See also *Baker* v. *Carr*, 369 U.S. 186, 217 (1962); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 215 (1974).

[12] See *Morgan* v. *United States*, 801 F.2d 445, 447 (D.C. Cir. 1986), cert. denied, 480 U.S. 911 (1987) (it is "difficult to imagine a clearer case of textually demonstrable constitutional commitment" than the language that "[e]ach House shall be the Judge of the

of the United States District Court for the District of Columbia have rejected the specific argument petitioner presents here.[13]

Faced with the plain text and history of the Constitution and the unanimous adverse court decisions, petitioner attempts to find support for his position in this Court's decision in *Powell* v. *McCormack*, 395 U.S. 486 (1969). Pet. App. 14-15. The contrast between that case and this one, however, simply highlights the correctness of the rulings below. In *Powell*, this Court reviewed a claim by Representative Powell that the House of Representatives had exceeded its substantive constitutional power to judge the "qualifications" of its Members. See Art. I, § 5, Cl. 1. The Court ruled that the House had

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Elections, Returns and qualifications of its own Members." Art. I, § 5, Cl. 1); *McIntyre* v. *Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985) (under Elections and Qualifications Clause, "[t]he House is not only 'Judge' but also final arbiter. Its decisions about which ballots count, and who won, are not reviewable in any court").

[13] Judge Gesell described as "mistaken" arguments advanced by former Judge Hastings and petitioner that they "have an individual right to an impeachment tried before the full Senate and that a federal district court may supervise the Senate's procedures for impeachment." *Hastings*, 716 F. Supp. at 40. See Pet. App. 72a. Earlier, Judge Harold Greene also had refused to review a similar challenge brought by former Judge Claiborne attacking the use of an evidentiary committee by the Senate in his impeachment trial: "The Senate's exercise of power to try impeachment is clearly not reviewable under the impeachment clause itself. Article I, section 3, clause 6 provides that the Senate shall have the 'sole' power to try all impeachments." Tr. at 4 in *Claiborne* v. *United States Senate*, Civ. No. 86-2780 (D.D.C. Oct. 8, 1986), appeal dismissed for lack of prosecution, No. 86-5622 (D.C. Cir. Mar. 23, 1987).

See also *In re Proceedings of Grand Jury No. 81-1*, 669 F. Supp. 1072, 1077-1078 (S.D. Fla.) (request by former Judge Hastings for access to evidentiary materials must be addressed to the proper Congressional authorities because "[t]he doctrine of the separation of powers * * * denies a court the power to dictate how the impeachment proceedings shall be conducted"), aff'd on other grounds, 833 F.2d 1438 (11th Cir. 1987).

erred by considering qualifications for membership beyond those "expressly set forth in the Constitution." 395 U.S. at 520-522, 548. The basis for the *Powell* holding was that "Article I, section 5 had no application, since the House action in question did *not* consist of judging 'qualifications' within the meaning of the provision." *Morgan* v. *United States*, 801 F.2d 445, 448 (D.C. Cir. 1986) (Scalia, J.), cert. denied, 480 U.S. 911 (1987).[14]

This Court's decision in *Powell* suggests, at most, only that judicial review might be available if the Senate were to exceed express textual limitations on its substantive impeachment powers: for example, if the Senate tried petitioner without prior House impeachment, Art. I, § 2, Cl. 5, or purported to impose a sanction more severe than removal or disqualification, Art. I, § 3, Cl. 7. But petitioner does not claim that the Senate lacked the power to try him or that it imposed an impermissible punishment. Rather, he is dissatisfied merely with the Senate's method of gathering evidence, and the Constitution does not specify what evidence gathering procedures the Senate shall employ. See Art. I, § 3, Cl. 6. Therefore, *Powell* —which did not involve congressional procedures at all— is of no assistance to petitioner.[15]

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[14] Furthermore, the Court carefully limited its justiciability holding in *Powell*; it was not asserting judicial power to review a Congressional "factual determination that a member did not meet one of the standing qualifications," which presented a question that "might still be barred by the political question doctrine." 395 U.S. at 521 n.42.

[15] Even if petitioner could surmount the nonjusticiability obstacle, his suit would encounter other jurisdictional barriers. The court of appeals did not reach the questions whether, assuming petitioner's suit is justiciable, he has identified an appropriate source for the waiver of sovereign immunity and whether the district court or the Claims Court would have subject matter jurisdiction over the dispute. See Pet. App. 15a n.3, 24a-27a. Additionally, to the extent that petitioner seeks reinstatement to the federal bench, it is far from clear that a court or the named respondents have the power to give him that relief.

2. If, as the courts have uniformly held, petitioner's claim is nonjusticiable, then that is the end of this matter. But even if petitioner's claim is justiciable, his arguments on the merits do not warrant plenary consideration by this Court. Petitioner's contention that the Senate cannot use a committee to compile an evidentiary record is plainly wrong for the reasons set forth in Judge Edward's opinion concurring in the judgment and in our brief in the court of appeals (at 39-70), which we summarize below.

a. Petitioner first asserts (Pet. 20) that the use of the verb "try" in the Impeachment Trial Clause somehow means that the Senate cannot use a committee to gather evidence. That argument, however, ignores the Framers' understanding and usage. As Judge Gesell observed in *Hastings* v. *United States Senate*, *supra*, (discussed at notes 2, 13, *supra*), "at the time the Constitution was drafted, definitions of 'try' included 'to sit in judgment' and 'to examine (a person) for the purpose of testing his qualifications.'" 716 F. Supp. at 40-41 (quoting *Oxford English Dictionary*). See Pet. App. 74a.[16] There is no evidence that the Framers intended, by using the word "try," to oblige the Senate to "grant[] the accused all the requirements of modern criminal due process," 716 F. Supp. at 40, or to dictate methods of evidentiary procedure. Plainly, "persons and bodies may sit in judgment without having received evidence in the manner Article III courts try criminal charges." *Id.* at 41. See Pet. App. 46a-47a.

b. Petitioner also contends (Pet. 20-21) that other clauses in the Constitution support his preferred usage. Those provisions, however, provide no basis for inferring that the Framers intended the word "try" in the Impeachment Trial Clause to have a more restrictive connotation than its then-accepted definition. Rather, the

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[16] See, *e.g.*, 2 M. Farrand, *supra*, at 67 (Rufus King) (the President, like members of Congress, "would periodically be *tried* for his behavior by his electors") (emphasis added).

constitutional provision providing for jury trials in criminal cases, which expressly excepts "Cases of Impeachment," Art. III, § 2, Cl. 3, reflects the Framers' understanding that in trying impeachments, the Senate "can never be tied down by such strict rules * * * as in common cases serve to limit the discretion of courts in favor of personal security." *The Federalist No. 65*, *supra*, at 428.[17] See Pet. App. 47a n.15.

c. Petitioner notes (Pet. 22-23) that the Framers gave the Senate final impeachment authority because it is a "numerous" body. That is true, but it hardly makes petitioner's point. The full Senate remains the "numerous" body that the Framers contemplated when it tries impeachments in accordance with its rules. It simply receives a complete record of testimonial and documentary evidence to assist it in reaching its judgment. The Framers' assignment of impeachment trials to the Senate did not reflect a decision that no fewer than 26 judges must hear witnesses testify in person or that the Senate could not assign a committee of its Members to prepare a written record of the testimony and evidence. See Pet. App. 54a-55a, n.19.

d. Petitioner next argues (Pet. 23-24) that the Senate's use of a committee is unconstitutional because it has only recently been utilized. As Judge Edwards explained, however, "all we know is that, for many years, the Senate apparently found it unnecessary even to consider using evidentiary committees in impeachment proceedings, and none was used." Pet. App. 50a. Moreover, the historical record refutes petitioner's claim that use

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[17] For example, a report of the Senate debate in the first impeachment trial, involving Senator William Blount, notes the statement of Senator James Ross that the proceeding "was not like a criminal prosecution in the forms of process * * *. It was neither a criminal nor civil prosecution but a trial by impeachment. The mode of proceeding was not according to the forms of the common law, but according to forms attached to that particular mode of trial." Aurora, Feb. 28, 1798, at 2, col. 2 (available in Library of Congress, Serial and Government Publications Division).

of a committee to gather evidence is a novel approach at odds with the early understanding. English impeachment practice was "[t]he model from which the idea of this institution has been borrowed." *The Federalist No. 65*, *supra*, at 427. The House of Lords had a long history of using committees to hear witnesses and compile evidence in impeachment trials.[18] Indeed, Thomas Jefferson described the House of Lords' impeachment trial procedures, including the practice of using committees, in a legislative manual that he prepared for the Senate's use when he served as its President from 1797 to 1801.[19] See Pet. App. 52a-54a. The historical record is reinforced by the Senate's longstanding use of evidentiary committees in performing its other quasi-judicial responsibilities.[20]

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[18] This history, which was well known to the Framers, may be traced at least as far back as the impeachment trial of Sir Francis Bacon in 1620, where the House of Lords "appointed a select Committee of themselves, to take Examination of Witnesses." *Proceedings in Parliament Against Francis Bacon* (1620), 2 State Trials 1087 (Howell ed. 1816). See also Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U.L. Rev. 512, 531 (1975).

[19] Jefferson explained in his manual that, in the House of Lords, "[t]he practice is to swear the witnesses in open House, and then examine them there: *or a committee may be named*, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand." *Jefferson's Parliamentary Writings: "Parliamentary Pocket-Book" and A Manual of Parliamentary Practice* 424 (W. Howell ed. 1988) (emphasis added).

[20] For example, when exercising its closely analogous power to discipline and expel its own Members, the Senate has long used committees to receive evidence. 7 Annals of Cong. 33-44 (1797) (expulsion of Senator William Blount in 1797). And, shortly before the Senate adopted Impeachment Rule XI, this Court approved the use of committees to receive evidence when "the Senate acts as a judicial tribunal" in judging elections and member qualifications. *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 616 (1929). See also *Reed* v. *County Commissioners*, 277 U.S. 376, 388 (1928). Similarly, the Senate has long used committees to receive

d. Finally, petitioner contends (Pet. 25-26) that the use of committees for evidentiary purposes is "inherently unfair," and he attempts to demonstrate that assertion by a showing that Senators who are not serving on evidentiary committees vote in favor of conviction in higher numbers than those on such committees. Petitioner's comparison, however, provides no convincing indication of "unfairness" given the wide variety of factors that might explain that divergence. In any event, more than two-thirds of those Senators who served on the Committee voted to convict petitioner on Article I, and conviction on that Article alone was sufficient to remove him from office. See Pet. App. 23a n.3. Moreover, petitioner fails to explain how it would be more fair to have evidentiary proceedings before the "full" Senate, which would often mean that very few Senators would actually be in attendance, and which petitioner has conceded would be constitutional irrespective of partial attendance. See Pet. App. 56a-57a, 84a-85a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

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evidence when performing the judicial task of trying legislative contempts. See *Groppi* v. *Leslie*, 404 U.S. 496, 501 (1972).

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No. 91-740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WALTER L. NIXON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION FILED BY RESPONDENTS AND AMICUS CURIAE UNITED STATES SENATE

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION FILED BY RESPONDENTS AND AMICUS CURIAE UNITED STATES SENATE

ARGUMENT

1. Respondents and *amicus curiae* do not address the principal reason the Court should grant a writ of certiorari in this case: To preserve the balance of powers between coordinate branches and ensure judicial independence, the courts must enforce the explicit constitutional mandate that the Senate try all impeachments.

Through the impeachment power, Congress possesses the ultimate power over judges and executive officials, but the Framers deliberately constructed a cumbersome impeachment procedure to control that ultimate power. That procedure requires impeachment by the House of Representatives, trial by the Senate, and conviction by a two-thirds vote in the Senate.

Contrary to the assertion by respondents and *amicus curiae*, *see* Opp. at 9, the clear command that the Senate try impeachments is no mere procedural "detail," unimportant to the Framers, and left to the complete discretion of the Senate. Instead, the Senate trial is fundamental to the impeachment process, and thereby safeguards the independence of the judiciary and the vitality of the Constitution itself. As the Chief Justice recently remarked, "a constitution's impressive catalogue of individual rights or limitations on government power is not enough if the judges who are called upon to enforce these rights have no independence from the other branches of government." Rehnquist, C.J., *The Bill of Rights and an Independent Judiciary*, at 26 (December 2, 1991).

2. Because respondents and *amicus curiae* relegate the Senate trial to the status of a procedural "detail," instead of recognizing it as an explicit constitutional requirement, they are incorrect in their argument that *Powell v. McCormack*, 395 U.S. 486 (1969), does not control here. *See* Opp. at 8, 12-13. In *Powell*, as in this case, an action by a House of Congress was defended on the ground that such action was taken pursuant to a constitutional grant of exclusive power to that House. Yet in that case, as here, judicial review was required because the action had exceeded an explicit limitation on that grant of power, and was contrary to an express constitutional command. In *Powell* the constitutional limitation was contained in the "qualifications" clause of the Constitution, art. I, § 2, cl. 2. In this case, it is contained in the grant of power itself—that the Senate shall try all impeachments. Art. I, § 3, cl. 6. Thus here, as in *Powell*, judicial review is required to enforce a textual limitation on congressional power, and to uphold the clear command of the Constitution.

3. Respondents and *amicus curiae* further argue that "the historical record refutes petitioner's claim that use of a committee to gather evidence is a novel approach at

odds with the early understanding," and that the "House of Lords had a long history of using committees to hear witnesses and compile evidence in impeachment trials." Opp. at 15-16. This argument misstates both petitioner's argument and the facts. The House of Lords used impeachment committees on a few occasions in the early 1600's—a century and a half before the Constitution was drafted. *See* Williams, *The Historical and Constitutional Bases for the Senate's Power To Use Masters or Committees To Receive Evidence in Impeachment Trials*, 50 N.Y.U. L. Rev. 512, 531-32 (1975). However, there appears to be "no direct reference to the use of committees during later impeachment trials" in the House of Lords, *id.*, much less a "long history" of such use there.

Although Jefferson's Manual refers to this early English practice, *see* Opp. at 16 & n.19, the committee trial procedure was not used by the Senate during the period Jefferson himself served as President of that body, nor during the period contemporaneous with the lives of the Framers.

Any contention that the Constitution implicitly authorizes dispensing with trial by the Senate ultimately is contradicted by the history of the impeachment clause itself. In particular, the drafters of the Constitution specifically rejected a proposal made by John Dickinson whereby judges could be removed by "address," through majority vote by either House or Senate but without a trial before either. *See* M. Farrand, *Records of the Federal Convention*, 428 (1966). Instead, the drafters chose the deliberately cumbersome two-step impeachment process, with trial by the Senate. For nearly two centuries of the nation's history, moreover, the Senate was faithful to this procedural requirement.[1]

---

[1] Respondents and *amicus curiae* suggest that review may not be warranted here because there is no basis for a waiver of sovereign immunity, and also because the Claims Court, not the district court, has subject matter jurisdiction over the dispute. Opp. at 13 n.15. The Administrative Procedure Act, however, expressly waives sover-

CONCLUSION

For all the foregoing reasons, and those stated in the petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the questions presented in the petition.

Respectfully submitted,

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eign immunity in actions against federal agencies or officers "seeking relief other than money damages." 5 U.S.C. § 702 (1988). The primary focus of petitioner's claim in this action, moreover, is declaratory relief. For this reason, jurisdiction in the Claims Court under the Tucker Act also is not warranted. *See Bowen v. Massachusetts*, 487 U.S. 879, 893, 901, 904 (1988); *see also Nixon v. United States*, Pet. App. A, at 24a-27a (Edwards, J., dissenting in part and concurring in the judgment).

Respondents and *amicus curiae* also erroneously state that petitioner's counsel conceded below that petitioner "could be tried in the presence of only a small number of Senators, as long as it was done on the Senate floor." Opp. at 8. No such concession was made, as the order denying Nixon's petition for rehearing makes clear. *See Nixon v. United States*, Pet. App. F, at 84a-85a (Edwards, J.). Moreover, as the petition to this Court emphasizes, under the Constitution a quorum of at least 51 Senators is required for the Senate to conduct its business, Pet. at 24, and whether some individual Senators might fail to attend trial proceedings on the Senate floor cannot legitimate the adoption of a committee procedure that conflicts with the clear requirements of the Constitution. *Id.*

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UNITED STATES OF AMERICA, ET AL.,

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed November 4, 1991 - Certiorari Granted February 24, 1992

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* The Opinion of the Court of Appeals below is reprinted as Appendix A to the Petition for Writ of Certiorari

APPENDIX A

RELEVANT DOCKET ENTRIES

Nixon v. United States, Civ. No. 89-3154
(U.S. District Court for the District
of Columbia)

DATE	DOCKET ENTRY
11/20/89	Complaint
01/19/90	Answer
01/22/90	Notice of Appearance of the United States Senate as Amicus Curiae
02/20/90	Plaintiff's Motion for Summary Judgment, with accompanying Memorandum in support
03/20/90	Memorandum of United States Senate as Amicus Curiae in support of Judgment for Defendants
03/22/90	Defendants' Motion for Judgment on the Pleadings or in the alternative for Summary Judgment, with accompanying Memorandum in support
04/05/90	Plaintiff's Reply Memorandum and Opposition to Defendants' Motion for Judgment on the Pleadings or for Summary Judgment
05/02/90	Memorandum of United States Senate as Amicus Curiae in Reply to Plaintiff's Opposition
05/03/90	Defendants' Reply Memorandum to Plaintiff's Opposition to Defendants' Motion for Judgment on the Pleadings or for Summary Judgment

06/21/90	Oral Argument on Plaintiff's Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings or for Summary Judgment
08/10/90	Memorandum Opinion Denying Plaintiff's Motion for Summary Judgment and Granting Defendants' Motion to Dismiss
08/16/90	Notice of Appeal

RELEVANT DOCKET ENTRIES

Nixon v. United States, No. 90-5246
(U.S. Court of Appeals for the District of Columbia Circuit)

DATE	DOCKET ENTRY
09/27/90	Appellant's Statement of the Issues to be Raised on Appeal
12/17/90	Appellant's Brief and Joint Appendix
02/01/91	Appellees' Brief
02/22/91	Appellant's Reply Brief
03/14/91	Oral Argument
07/09/91	Opinion
07/31/91	Petition for Rehearing
08/05/91	Order Denying Petition for Rehearing

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 89-3154-LFO

WALTER L. NIXON, JR.,
1204 Iola Road
Ocean Springs, MS 39564
(601) 875-2082,

Plaintiff,

v.

UNITED STATES OF AMERICA,

JAMES E. BAKER, III,
United States Secretary of State,
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RALPH MECHAM, Director,
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United States Courts,
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Defendants.

COMPLAINT OF WALTER L. NIXON, JR. FOR DECLARATORY JUDGMENT

This action seeks a declaratory judgment that conviction by the United States Senate on impeachment articles may not constitutionally be reached on the basis of a trial before a committee of only twelve senators, and that plaintiff is entitled to payment of his salary and benefits as a United States District Judge from and after November 3, 1989, on which date the

Senate unconstitutionally entered a judgment of conviction against him on two impeachment articles.

JURISDICTION

1. This is an action for declaratory relief under 28 U.S.C. §§2201 and 2202. Jurisdiction over this action is conferred by 28 U.S.C. §1331 because the claims set forth arise under the Constitution.

VENUE

2. Venue is established in the District of Columbia under 28 U.S.C. §1391(b) because all of the defendants reside or have their official offices within the District of Columbia, and conduct their business within the District of Columbia.

PARTIES

3. Plaintiff Walter L. Nixon, Jr. was, until November 3, 1989, Chief Judge of the United States District Court for the Southern District of Mississippi, having been appointed by the President and confirmed by the Senate in 1968. He resides in Ocean Springs, Mississippi.

4. Defendant United States of America provided the general funds from which plaintiff Nixon's salary as a United States District Judge was paid. Plaintiff Nixon served defendant United States of America as a District Judge until removed from office by vote of the United States Senate on two Articles of Impeachment on November 3, 1989.

5. Defendant James E. Baker, III is the United States Secretary of State. Pursuant to Senate Impeachment Rule XXIII, any judgment of conviction in an impeachment case is deposited with his office.

6. Defendant Ralph Mecham is Director of the Administrative Office of the United States Courts, the agency

responsible for the provision of compensation and other benefits to plaintiff Nixon as a United States District Judge.

7. The individual defendants are sued only in their official capacities.

BACKGROUND

8. Under the Constitution, plaintiff Nixon could be removed from office only pursuant to impeachment as provided in Article II, Section 4 of the Constitution, upon a two-thirds vote by the Senate finding him guilty of "High Crimes or Misdemeanors."

9. Until 1986, all evidentiary hearings in impeachment cases were conducted on the floor of the Senate, in full view and hearing of the entire membership of the Senate. The full Senate received all testimony and evidence in an impeachment case.

10. On May 10, 1989, the House of Representatives adopted three Articles of Impeachment against plaintiff Nixon and appointed five congressmen to present those Articles to the Senate ("the House Managers").

11. The Articles of Impeachment alleged that Nixon intentionally made false statements to a grand jury and to federal officials in 1984. Nixon was convicted in 1986 in the Southern District of Mississippi on two counts asserting similar allegations, but continues to assert his innocence in every respect.

12. As in most perjury cases, the credibility of the witnesses in Nixon's case was particularly important. The Report of the Senate Committee that heard the evidence in Nixon's trial stated that the testimony was "dramatically inconsistent" and referred to "extensive contradictory evidence" before the Committee. One major prosecution witness recanted his former testimony against Nixon and said he gave false testimony in order to please the government. A second key prosecution

witness has admitted to giving false testimony under oath on numerous occasions.

13. On May 11, 1989, the Articles of Impeachment were exhibited in the Senate and the Senate adopted Senate Resolution 128, which, pursuant to Rule XI of the Senate Impeachment Rules, appointed a committee of twelve Senators [the "Nixon Committee"] "to receive and report evidence with respect to articles of impeachment against Judge Walter L. Nixon, Jr." The Nixon Committee was authorized to submit to the Senate a "certified copy of the transcript of the proceedings and testimony had and given before it," and also to "report to the Senate a statement of facts and a summary . . . of evidence that the parties have introduced on the contested issues of fact."

14. By Order dated July 25, 1989, the Nixon Committee denied Nixon's motion requesting that all evidentiary hearings be held before the full Senate. The Nixon Committee also denied all of Nixon's other pretrial motions.

15. The evidentiary hearings in the impeachment case were conducted before the Nixon Committee on September 7, 8, 11, and 12, 1989. A quorum of only seven Committee members was required for the Committee to receive evidence on each day, and ten witnesses gave live testimony. The Nixon Committee received a large volume of documentary materials as exhibits as well as the record of Judge Nixon's initial criminal trial, post-conviction proceedings, and the impeachment inquiry of the Subcommittee on Civil and Constitutional Rights and Liberties of the House Judiciary Committee. Also, extensive sworn written statements were introduced into the record.

16. Following the close of the evidentiary record, the Nixon Committee produced and distributed a Report which purported to summarize in a neutral manner the positions of the parties and the evidence before the Committee. By omitting

several passages of Nixon's prior testimony, the Committee Report inaccurately and misleadingly stated that Nixon's testimony before the Senate Committee "contrasted" with his testimony in earlier proceedings, a very serious conclusion in a perjury case in which credibility was the critical issue. This supposedly contrasting testimony related to Nixon's state of mind at the time he gave the supposedly false statements in 1984, and therefore was directly relevant to the Articles of Impeachment and was adverse to plaintiff.

17. After the Committee Report was prepared, the House Managers and plaintiff Nixon submitted closing briefs which were distributed to all members of the Senate. Nixon's closing brief was submitted on October 24, 1989, and renewed Nixon's motion for the trial to be conducted before the full Senate.

18. On November 1, 1989, the House Managers, plaintiff Nixon, and counsel for Nixon made closing arguments to the full Senate on the Senate floor. Following the summations, certain Senators submitted written questions to the President Pro Tempore, who addressed those questions to Nixon or the House Managers, as appropriate. The entire floor proceedings consumed less than four hours. No evidence was taken during the floor proceedings.

19. On November 2, 1989, the Senate met in executive session to deliberate on the impeachment articles and pending motions. The deliberations lasted for approximately six hours.

20. On November 3, 1989, the Senate met to vote on the impeachment articles. Before voting on those Articles, the Senate voted 92-7 to deny Nixon's motion for trial before the full Senate and voted 63-34 to deny Nixon's motion to dismiss Article III.

21. On the impeachment articles, the Senate voted as follows:

	Guilty	Not Guilty
Article I	89	8
Article II	78	19
Article III	57	40

On each Article of Impeachment, Nixon drew significantly greater support from those Senators who served on the Nixon Committee and thus heard the evidence and witnesses, than from those senators who did not serve on the Committee and thus did not hear the evidence:

	Committee Members Voting for Acquittal	Non-Committee Members Voting for Acquittal
Article I	3/12 (25%)	5/85 (6%)
Article II	5/12 (42%)	14/85 (16%)
Article III	6/12 (50%)	36/85 (42%)

22. Following the vote on the Articles of Impeachment, the President Pro Tempore announced a judgment of conviction on Articles I and II, and of acquittal on Article III. That judgment was recorded by the Secretary of the Senate, who deposited the judgment with defendant Baker.

23. Based on the Senate judgment, defendant Mecham, directly or through his agents, has ceased authorizing payment of plaintiff Nixon's salary or other benefits as a United States District Judge.

24. In June 1989, Nixon intervened in an action brought by Judge Alcee L. Hastings in the United States District Court for the District of Columbia. Although Judge Hastings raised a number of issues, Nixon presented only the constitutional claim stated in this Complaint.

25. On July 5, 1989, Judge Gesell dismissed Nixon's claim, finding the case non-justiciable. C.A. No. 89-1602.

26. On October 18, 1989, the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's dismissal on the sole ground "that considerations

of *ripeness* and vital comity concerns, fundamental to our federalist system and the balance of power our Constitution establishes, precludes judicial intervention *at this juncture*." No. 89-5191 (emphasis added). The Court of Appeals also noted that "we have reached no question going to the merits of [Nixon's] challenges."

CLAIM
(Article I, Section 3, Clause 6 Of The Constitution)

27. The Constitution provides that the Senate shall have "the sole Power to try all Impeachments," and that "when sitting for the Purpose, they be upon Oath or Affirmation."

28. The members of the Senate took an oath on May 11, 1989, to "do impartial justice according to the Constitution and laws" in the impeachment proceeding concerning Nixon. The one hundred members of the Senate were both judges and jurors in that proceeding.

29. Nevertheless, by Impeachment Rule XI and Resolution 128, the Senate delegated to the Nixon Committee the hearing of all evidentiary matters, thereby assuring that eighty-eight senators, or more than seven-eighths of that body, neither heard nor saw the witnesses during the trial and played no role in determining the procedures to be followed.

30. Because Impeachment Rule XI and Senate Resolution 128 thereby excluded more than seven-eighths of the Senate from hearing the witnesses and the evidence in this case, they were contrary to the direction in Article I, section 3, clause 6 of the Constitution that the Senate shall try all impeachments, and the judgments of conviction entered on Articles I and II were unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Nixon requests that this Court enter judgment declaring:

i) that Senate Impeachment Rule XI and Resolution 128 are unconstitutional in that they denied Nixon a trial before the Senate, as provided in Article I, section 3, clause 6 of the Constitution, and thereby abrogate the Senate's constitutional responsibility to try all impeachments;

(ii) that the judgment of conviction entered by the Senate on November 3, 1989, based upon trial before only a committee of twelve Senators, is unconstitutional; and

(iii) that Nixon remains entitled to full pay and benefits as United States District Judge from November 3, 1989 forward.

Respectfully submitted,

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Date: November 20, 1989

APPENDIX C

SENATE VOTES ON THE ARTICLES OF IMPEACHMENT AGAINST JUDGE WALTER L. NIXON, JR.

(From the Congressional Record—Senate, November 3, 1989, *reprinted in* Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr., S. Doc. No. 22, 101st Cong., 1st Sess. 427 (1989).)

[Quorum Call]

Mr. MITCHELL. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll and the following Senators entered the Chamber and answered to their names:

[Quorum No. 11]

Armstrong	Byrd	Kerrey
Boschwitz	Dixon	Kohl
Bryan	Dole	Mitchell
Bumpers	Hatfield	

The PRESIDENT pro tempore. A quorum is not present. The clerk will call the roll of the absentees.

Mr. MITCHELL. Mr. President, I move that the Sergeant at Arms be instructed to request the attendance of absent Senators and I ask for the yeas and nays.

The PRESIDENT pro tempore. Is the demand sustained? Obviously the demand is sustained.

The yeas and nays are ordered and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Oklahoma [Mr. Boren] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

Mr. SIMPSON. I announce that the Senator from Arizona [Mr. McCain] is necessarily absent.

The PRESIDENT pro tempore. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 96, nays 1, as follows:

[Rollcall Vote No. 283 Leg.]

YEAS—96

Adams	Daschle	Helms
Armstrong	DeConcini	Hollings
Baucus	Dixon	Inouye
Bentsen	Dodd	Jeffords
Biden	Dole	Johnston
Bingaman	Domenici	Kassbaum
Bond	Durenberger	Kasten
Boschwitz	Exon	Kennedy
Breaux	Ford	Kerrey
Bryan	Fowler	Kerry
Bumpers	Garn	Kohl
Burdick	Glenn	Lautenberg
Burns	Gore	Leahy
Byrd	Gorton	Levin
Chafee	Graham	Lieberman
Coats	Gramm	Lott
Cochran	Grassley	Lugar
Cohen	Harkin	Mack
Conrad	Hatch	Matsunaga
Cranston	Hatfield	McClure
D'Amato	Heflin	McConnell
Danforth	Heinz	Metzenbaum

Mikulski	Reid	Simon
Mitchell	Riegle	Simpson
Moynihan	Robb	Specter
Murkowski	Rockefeller	Stevens
Nickles	Roth	Symms
Nunn	Rudman	Thurmond
Packwood	Sanford	Wallop
Pell	Sarbanes	Warner
Pressler	Sasser	Wilson
Pryor	Shelby	Wirth

NAYS—1

Humphrey

NOT VOTING—3

Boren	Bradley	McCain

So the motion was agreed to.

The PRESIDENT pro tempore. A quorum is present. There will be order in the Senate.

IMPEACHMENT OF JUDGE WALTER L. NIXON, JR.

The PRESIDENT pro tempore. Under the previous order, the hour of 10 a.m. having arrived and a quorum having been established, the Senate will resume its consideration of the articles of impeachment against Judge Walter L. Nixon, Jr. The managers on the part of the House and respondent and his party will now take their places in the well in the Chamber.

The Deputy Sergeant at Arms will make the proclamation.

The Deputy Sergeant at Arms, Jeanine Drysdale-Lowe, made proclamation as follows:

> Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting for the

trial of the articles of impeachment exhibited by the House of Representatives against Walter L. Nixon, Jr., U.S. district judge for the Southern District of Mississippi.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. MITCHELL. Mr. President, if I may have the attention of my colleagues.

The PRESIDENT pro tempore. The Senate will be in order. The majority leader is recognized.

Mr. MITCHELL. Mr. President, we will this morning be voting on two motions and, depending upon the outcome of those motions, on three articles of impeachment. That means a maximum potential of five votes. In view of the importance of these proceedings, in the interest of fairness to all concerned and also in the interest of maintaining proper decorum in the Senate, I ask that Senators remain in their seats during the voting and respond when their name is called by the clerk. That will also have the added benefit of expediting the proceedings.

The first rollcall vote will, in accordance with our practices, be a 15-minute rollcall vote. The subsequent rollcall votes need only take such time as to permit each Senator to respond. Therefore, I urge Senators to remain in their seats during the voting and respond when their name is called by the clerk. That will also have the added benefit of expediting the proceedings.

Also, Mr. President, I ask unanimous consent that at any time in the proceeding which they choose, Judge Nixon and his counsel be permitted to excuse themselves.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. MITCHELL. So counsel and the judge know that at any time they wish, following the completion of the vote, they may excuse themselves at any time.

Mr. President, the Senate deliberated yesterday for 6 hours on the articles of impeachment against Judge Walter L. Nixon, Jr. We meet this morning to vote on Judge Nixon's two pending motions and, depending upon the disposition of those motions, on the three articles of impeachment.

JUDGE NIXON'S MOTION FOR TRIAL BY THE SENATE

The PRESIDENT pro tempore. The Senate will now proceed to vote on Judge Nixon's first motion. The clerk will read Judge Nixon's motion for trial by the Senate.

The assistant legislative clerk read as follows:

JUDGE NIXON'S MOTION FOR TRIAL BY THE SENATE

> Respondent Walter L. Nixon, Jr., through his undersigned attorneys, hereby moves that the Senate trial in this case be convened before and conducted in the presence of the entire body of the Senate, as required by article I, section 3, clause 6 of the Constitution, as set forth at greater length in the attached supporting Memorandum.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. MITCHELL. Mr. President, I ask for the yeas and nays.

The PRESIDENT pro tempore. Is the demand sustained? Obviously, the demand is sustained.

The yeas and nays were ordered.

VOTE ON JUDGE NIXON'S MOTION FOR TRIAL BY THE SENATE

The PRESIDENT pro tempore. A "yea" vote would be in favor of granting Judge Nixon's motion. A "nay" vote would be in opposition to granting Judge Nixon's motion. The clerk will call the roll and please repeat the responses.

The legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Oklahoma [Mr. BOREN] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

I further announce that, if present and voting, the Senator from New Jersey [Mr. Bradley] would vote "nay."

Mr. SIMPSON. I announce that the Senator from Arizona [Mr. McCain] is necessarily absent.

The PRESIDENT pro tempore. Are there any Senators who have not voted?

The result was announced—yeas 7, nays 90, as follows:

[Rollcall Vote 284]

(Judge Nixon's motion for trial by the Senate—Court of Impeachment—Judge Walter L. Nixon, Jr.)

YEAS—7

Heflin	Packwood	Specter
Helms	Sanford	Wallop
Mack		

NAYS—90

Adams	Bingaman	Bumpers
Armstrong	Bond	Burdick
Baucus	Boschwitz	Burns
Bentsen	Breaux	Byrd
Biden	Bryan	Chafee

Coats	Hatch	Mitchell
Cochran	Hatfield	Moynihan
Cohen	Heinz	Murkowski
Conrad	Hollings	Nickles
Cranston	Humphrey	Nunn
D'Amato	Inouye	Pell
Danforth	Jeffords	Pressler
Daschle	Johnston	Pryor
DeConcini	Kassebaum	Reid
Dixon	Kasten	Riegle
Dodd	Kennedy	Robb
Dole	Kerrey	Rockefeller
Domenici	Kerry	Roth
Durenberger	Kohl	Rudman
Exon	Lautenberg	Sarbanes
Ford	Leahy	Sasser
Fowler	Levin	Shelby
Garn	Lieberman	Simon
Glenn	Lott	Simpson
Gore	Lugar	Stevens
Gorton	Matsunaga	Symms
Graham	McClure	Thurmond
Gramm	McConnell	Warner
Grassley	Metzenbaum	Wilson
Harkin	Mikulski	Wirth

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—3

Boren	Bradley	McCain

The PRESIDENT pro tempore. On this vote, there are 7 yeas, 90 nays. Judge Nixon's motion for trial by the Senate is denied.

JUDGE NIXON'S MOTION TO DISMISS IMPEACHMENT ARTICLE III

The PRESIDENT pro tempore. The clerk will now read Judge Nixon's motion to dismiss impeachment article III.

The legislative clerk read as follows:

> Judge Walter L. Nixon, Jr. through his undersigned counsel, hereby moves for an order of the Senate dismissing Impeachment Article III on the grounds stated:
>
> 1. The allegations that an impeachable offense has been made out if "Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, * * * and brought disrepute on the Federal courts and the administration of justice by the Federal courts. * * *"
>
> These allegations do not make out an impeachable offense under Article II, sec. 4 of the Constitution.
>
> 2. Specifications III(2)(A), (D), (E), (F), and (G), which are redundant and multiplicitous of allegations in Impeachment Article I and Article II.
>
> 3. The Article, which charges five different offenses for each of fourteen specific events, thus present seventy allegations. Such a complex and confusing Article is both unfair and completely unworkable.

The PRESIDENT pro tempore. The majority leader is recognized.

Mr. MITCHELL. Mr. President, I ask for the yeas and nays.

The PRESIDENT pro tempore. Is the demand for the yeas and nays sustained? Obviously, the demand is sustained.

The yeas and nays were ordered.

VOTE ON JUDGE NIXON'S MOTION TO DISMISS IMPEACHMENT ARTICLE III

The PRESIDENT pro tempore. A yea vote would be in favor of granting Judge Nixon's motion. A nay vote would be in opposition to granting Judge Nixon's motion. The clerk will call the roll, and please repeat the response.

The assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Oklahoma [Mr. Boren] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

I further announce that, if present and voting, the Senator from New Jersey [Mr. Bradley] would vote "nay."

Mr. SIMPSON. I announce that the Senator from Arizona [Mr. McCain] is necessarily absent.

The PRESIDENT pro tempore. Are there any Senators in the Chamber who have not voted or who wish to change their vote?

The result was announced—yeas 34, nays 63, as follows:

[Rollcall Vote No. 285]

(Judge Nixon's motion to dismiss impeachment article III—Court of Impeachment—Judge Walter L. Nixon, Jr.)

YEAS—34

Adams	Chafee	Exon
Biden	Conrad	Graham
Bingaman	Dixon	Hatch
Bryan	Dole	Hatfield
Burdick	Domenici	Heflin

Johnston	Mack	Sanford
Kasten	McClure	Sasser
Kerrey	Metzenbaum	Simon
Kerry	Moynihan	Symms
Kohl	Murkowski	Wallop
Levin	Pryor	
Lieberman	Reid	

NAYS—63

Armstrong	Glenn	Nickles
Baucus	Gore	Nunn
Bentsen	Gorton	Packwood
Bond	Gramm	Pell
Boschwitz	Grassley	Pressler
Breaux	Harkin	Riegle
Bumpers	Heinz	Robb
Burns	Helms	Rockefeller
Byrd	Hollings	Roth
Coats	Humphrey	Rudman
Cochran	Inouye	Sarbanes
Cohen	Jeffords	Shelby
Cranston	Kassebaum	Simpson
D'Amato	Kennedy	Specter
Danforth	Lautenberg	Stevens
Daschle	Leahy	Symms
DeConcini	Lott	Thurmond
Dodd	Lugar	Warner
Durenberger	Matsunaga	Wilson
Ford	McConnell	Wirth
Fowler	Mikulski	
Garn	Mitchell	

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—3

Boren	Bradley	McCain

The PRESIDENT pro tempore. On this vote, 34 Senators have voted in the affirmative, 63 Senators have voted in the negative. Therefore, Judge Nixon's motion to dismiss the impeachment article No. III is denied.

ARTICLE I

The PRESIDENT pro tempore.. The clerk will now read the first article of impeachment.

The assistant legislative clerk read as follows:

ARTICLE I

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District of Mississippi (Hattiesburg Division) to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the criminal prosecution of Fairchild's son, Drew Fairchild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Forrest County District Attorney Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

VOTE ON ARTICLE I

The PRESIDENT pro tempore. On this vote, the yeas and nays are automatic.

The Chair reminds the Senate that in voting on articles of impeachment, each Senator, when his or her name is called, would stand in his or her place and vote guilty or not guilty.

Senators how say you, is the respondent, Walter L. Nixon, Jr., guilty or not guilty?

The clerk will call the roll.

Mr. CRANSTON. I announce that the Senator from Oklahoma [Mr. BOREN] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

I further announce that, if present and voting, the Senator from New Jersey [Mr. Bradley] would vote "guilty."

Mr. SIMPSON. I announce that the Senator from Arizona [Mr. McCain] is necessarily absent.

The PRESIDENT pro tempore. Have all Senators voted?

The result was announced—guilty 89, not guilty 8, as follows:

[Rollcall Vote No. 286]

(Subject: Article I—Court of Impeachment—Judge Walter L. Nixon)

YEAS—89

Adams	Burdick	DeConcini
Armstrong	Burns	Dixon
Baucus	Byrd	Dodd
Bentsen	Coats	Dole
Biden	Cochran	Domenici
Bingaman	Cohen	Durenberger
Bond	Conrad	Exon
Boschwitz	Cranston	Ford
Breaux	D'Amato	Fowler
Bryan	Danforth	Garn
Bumpers	Daschle	Glenn

Gore	Kerry	Pryor
Gorton	Kohl	Reid
Graham	Lautenberg	Riegle
Gramm	Leahy	Robb
Grassley	Levin	Rockefeller
Harkin	Lieberman	Roth
Hatch	Lott	Rudman
Heflin	Lugar	Sarbanes
Heinz	Matsunaga	Shelby
Helms	McConnell	Simon
Hollings	Metzenbaum	Simpson
Humphrey	Mikulski	Specter
Inouye	Mitchell	Stevens
Jeffords	Moynihan	Thurmond
Johnston	Murkowski	Wallop
Kassebaum	Nickles	Warner
Kasten	Nunn	Wilson
Kennedy	Packwood	Wirth
Kerrey	Pressler	

NAYS—8

Chafee	McClure	Sasser
Hatfield	Pell	Symms
Mack	Sanford	

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—3

Boren	Bradley	McCain

The PRESIDENT pro tempore. On the first article of impeachment, 89 Senators have voted guilty, 8 Senators have voted not guilty. Two-thirds of the Members present having voted guilty, the Senate accordingly adjudges that the respondent, Walter L. Nixon, Jr., is guilty as charged in this first article.

ARTICLE II

The PRESIDENT pro tempore. The clerk will now read the second article of impeachment.

The legislative clerk read as follows:

ARTICLE II

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District to Mississippi to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the prosecution of Fairchild's son, Drew Fairchild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Judge Nixon had nothing whatsoever officially or unofficially to do with the Drew Fairchild case in Federal court or State court; and that Judge Nixon "never handled any part of it, never had a thing to do with it at all, and never talked to anyone, State or Federal prosecutor or judge, that in any way influenced anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

VOTE ON ARTICLE II

The PRESIDENT pro tempore. Senators how say you? Is the respondent, Walter L. Nixon, Jr., guilty or not guilty?

The clerk will call the roll, and please repeat the responses.

The assistant legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Oklahoma [Mr. Boren] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

I further announce that, if present and voting, the Senator from New Jersey [Mr. Bradley] would vote "guilty."

Mr. SIMPSON. I announce that the Senator from Arizona [Mr. McCain] is necessarily absent.

The result was announced—guilty 78, not guilty 19, as follows:

[Rollcall Vote No. 287]

(Subject: Article II—Court of Impeachment—Judge Walter L. Nixon, Jr.)

GUILTY—78

Adams	D'Amato	Hatch
Baucus	Danforth	Heflin
Bentson	Daschle	Heinz
Biden	DeConcini	Helms
Bingaman	Dixon	Hollings
Bond	Dodd	Humphrey
Boschwitz	Exon	Inouye
Breaux	Ford	Johnston
Bryan	Fowler	Kassebaum
Bumpers	Garn	Kasten
Burdick	Glenn	Kennedy
Burns	Gore	Kerrey
Byrd	Gorton	Kerry
Coats	Graham	Kohl
Cohen	Gramm	Lautenberg
Conrad	Grassley	Leahy
Cranston	Harkin	Levin

Lieberman	Nunn	Sarbanes
Lugar	Pressler	Shelby
Matsunaga	Pryor	Simon
McConnell	Reid	Simpson
Metzenbaum	Riegle	Specter
Mikulski	Robb	Stevens
Mitchell	Rockefeller	Warner
Moynihan	Roth	Wilson
Nickles	Rudman	Wirth

NOT GUILTY—19

Armstrong	Jeffords	Sanford
Chafee	Lott	Sasser
Cochran	Mack	Symms
Dole	McClure	Thurmond
Domenici	Murkowski	Wallop
Durenberger	Packwood	
Hatfield	Pell	

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—3

Boren	Bradley	McCain

The PRESIDENT pro tempore. All Senators having voted, on the second article of impeachment, 78 Senators have voted guilty; 19 Senators have voted not guilty.

Two-thirds of the Members present having voted guilty, the Senate adjudges that the respondent, Walter L. Nixon, Jr., is guilty as charged in this article.

ARTICLE III

The PRESIDENT pro tempore. The clerk will now read the third article of impeachment.

The assistant legislative clerk read as follows:

ARTICLE III

By virtue of his office as a judge of the United States District Court for the Southern District of Mississippi, Judge Nixon is required to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to obey the laws of the United States.

Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts by the following:

After entering into an oil and gas investment with Wiley Fairchild, Judge Nixon conversed with Wiley Fairchild, Carroll Ingram, and Forrest County District Attorney Paul Holmes concerning the State criminal drug conspiracy prosecution of Drew Fairchild, the son of Wiley Fairchild, and thereafter concealed those conversations as follows:

(1) Judge Nixon concealed those conversations through one or more material false or misleading statements knowingly made to an attorney from the United States Department of Justice and a special agent of the Federal Bureau of Investigation during an interview of Judge Nixon conducted in Biloxi, Mississippi, on April 19, 1984. The substance of the false or misleading statements included the following:

(A) Judge Nixon never discussed with Wiley Fairchild anything about Wiley's son's case.

(B) Wiley Fairchild never brought up his son's case.

(C) At the time of the interview Judge Nixon had no knowledge of the Drew Fairchild case and did not even know Drew Fairchild existed, except for what the judge previously read in the newspaper and what he learned from the questioners in the interview.

(D) Nothing was done or nothing was ever mentioned about Wiley Fairchild's son.

(E) Judge Nixon had never heard about the Drew Fairchild case, except what he told the questioners in the interview, and certainly had nothing to do with the case.

(F) Judge Nixon had done nothing to influence the Drew Fairchild case.

(G) State prosecutor Paul Holmes never talked to Judge Nixon about the Drew Fairchild case.

(2) Judge Nixon further concealed his conversations with Wiley Fairchild, Paul Holmes, and Carroll Ingram concerning the Drew Fairchild case by knowingly giving one or more material false or misleading statements to a Federal grand jury during testimony under oath in Hattiesburg, Mississippi, on July 18, 1984. The substance of the false or misleading statements included the following:

(A) Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

(B) To the best of his knowledge and recollection, Judge Nixon did not know of any reason he would have met with Wiley Fairchild after the Nixon-Fairchild oil and gas investment was finalized in February 1981.

(C) Judge Nixon gave the grand jury all the information that he had and that he could and had withheld nothing during his grand jury testimony.

(D) Judge Nixon had nothing whatsoever unofficially to do with the Drew Fairchild criminal case in State court.

(E) Judge Nixon never talked to anyone, including the State prosecutor, about the Drew Fairchild case.

(F) Judge Nixon never had a thing to do with the Drew Fairchild case at all.

(G) Judge Nixon "never talked to anyone, State or Federal, prosecutor or judge, in any way influence anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

VOTE ON ARTICLE III

The PRESIDENT pro tempore. Senators, how say you? Is the respondent, Walter L. Nixon, Jr., guilty or not guilty?

The clerk will call the roll on the third article of impeachment, and please repeat the responses.

The legislative clerk called the roll.

Mr. CRANSTON. I announce that the Senator from Oklahoma [Mr. Boren] and the Senator from New Jersey [Mr. Bradley] are necessarily absent.

I further announce that, if present and voting, the Senator from New Jersey [Mr. Bradley] would vote "guilty."

Mr. SIMPSON. I announce that the Senator from Arizona [Mr. McCain] is necessarily absent.

The result was announced—guilty 57, not guilty 40, as follows:

[Rollcall Vote No. 288]

(Subject: Article III—Court of Impeachment—Walter L. Nixon, Jr.)

GUILTY—57

Armstrong	Glenn	Mikulski
Bentsen	Gore	Mitchell
Bond	Gorton	Nickles
Boschwitz	Gramm	Pell
Breaux	Grassley	Pressler
Bumpers	Heinz	Riegle
Byrd	Helms	Robb
Coats	Hollings	Rockefeller
Cochran	Humphrey	Roth
Cohen	Inouye	Rudman
D'Amato	Jeffords	Sarbanes
Danforth	Kassebaum	Shelby
Daschle	Kennedy	Simpson
DeConcini	Lautenberg	Specter
Dodd	Leahy	Stevens
Durenberger	Lott	Thurmond
Ford	Lugar	Warner
Fowler	Matsunaga	Wilson
Garn	McConnell	Wirth

NOT GUILTY—40

Adams	Chafee	Graham
Baucus	Conrad	Harkin
Biden	Cranston	Hatch
Bingaman	Dixon	Hatfield
Bryan	Dole	Heflin
Burdick	Domenici	Johnston
Burns	Exon	Kasten

Kerrey	Metzenbaum	Sanford
Kerry	Moynihan	Sasser
Kohl	Murkowski	Simon
Levin	Nunn	Symms
Lieberman	Packwood	Wallop
Mack	Pryor	
McClure	Reid	

ABSENT, NOT VOTING, OR EXCUSED FROM VOTING—3

Boren	Bradley	McCain

The PRESIDENT pro tempore. Have all Senators in the Chamber voted?

Upon this article of impeachment, 57 Senators having voted guilty, 40 Senators having voted not guilty, less than two-thirds of the Members present having voted guilty, the Senate adjudges that the respondent, Walter L. Nixon, Jr., is not guilty as charged in the third article of impeachment.

The Chair directs judgment to be entered in accordance with the vote of the Senate, as follows:

The Senate, having tried Walter L. Nixon, Jr., U.S. district judge for the Southern District of Mississippi, upon three articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of the charges contained in articles I and II of the articles of impeachment, it is, therefore, ordered and adjudged that the said Walter L. Nixon, Jr., be, and he is hereby, removed from office.

The majority leader is recognized.

Mr. MITCHELL. Mr. President, I send to the desk an order.

The PRESIDING pro tempore. The clerk will report the order.

The legislative clerk read as follows:

Ordered, That the Secretary be directed to communicate to the Secretary of State, as provided by rule XXIII of Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, and also to the House of Representatives the judgment of the Senate in the case of Walter L. Nixon, Jr., and transmit a certified copy of the judgment to each.

The PRESIDENT pro tempore. Without objection, the order will be entered and adjudged.

In the Senate of the United States,

November 3 (legislative day, September 18), 1989

JUDGMENT

The Senate having tried Walter L. Nixon, Jr., United States District Judge for the Southern District of Mississippi, upon three Articles of Impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present having found him guilty of the Charges contained in Articles I and II of the Articles of Impeachment: it is therefore,

Ordered and adjudged, That the said Walter L. Nixon, Jr. be, and he is hereby, removed from office.

Attest:

Secretary.

By: _____
Assistant Secretary

In the Senate of the United States,

November 3 (legislative day, September 18), 1989

Ordered, That the Secretary be directed to communicate to the Secretary of State, as provided by Rule XXIII of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, and also to the House of Representatives the judgment of the Senate in the case of Walter L. Nixon, Jr., and transmit a certified copy of the judgment to each.

Attest:

Secretary.

By: _____
Assistant Secretary

Supreme Court, U.S.
FILED
APR 24 1992
OFFICE OF THE CLERK

(5)

No. 91-740

IN THE

Supreme Court of the United States

October Term, 1991

WALTER L. NIXON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

Petitioner was removed from office as a federal judge in 1989 following an impeachment hearing before a committee of twelve Senators.

1. Whether a committee hearing on perjury charges, in which eighty-eight members of the Senate are unable to evaluate witness credibility, satisfied the express constitutional command in Article I, section 3, clause 6 that the Senate "try all Impeachments."

2. Whether the courts' refusal to review a claim that the Senate committee hearing procedure is unconstitutional is contrary to the holding in *Powell v. McCormack*, 395 U.S. 486 (1969), disrupts the constitutional balance of powers, and threatens judicial independence.

LIST OF PARTIES TO THE PROCEEDING IN THE U.S. COURT OF APPEALS

WALTER L. NIXON, JR.
Appellant

UNITED STATES OF AMERICA,
JAMES A. BAKER, III,
U.S. Secretary of State,
and RALPH MECHAM,
Director of the Administrative Office
of the United States Courts,
Appellees

UNITED STATES SENATE
Amicus Curiae

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No. 91-740

IN THE

Supreme Court of the United States

October Term, 1991

WALTER L. NIXON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The three opinions of the court of appeals are reported at 938 F.2d 239 (D.C. Cir. 1991) and are included as Appendix A to the Petition for Writ of Certiorari ("Pet. App. A"), at 1a-57a. The opinion of the court of appeals denying a petition for rehearing (Pet. App. F, at 84a-85a) is unreported. The district court decision (Pet. App. B, at 58a-69a) is reported at 744 F. Supp. 9 (D.D.C. 1990).

JURISDICTION

The decision of the court of appeals was issued on July 9, 1992. A petition for rehearing was denied on August 5, 1991 (Pet. App. E, at 83a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND SENATE RULE INVOLVED

The following provisions of the Constitution and Senate Rule are set out in Appendix A to this Brief ("Pet. Br. App. A"):

Article I, Section 3, Clauses 6 and 7

Article II, Section 2, Clause 1

Article II, Section 4

Article III, Section 2, Clause 3

Senate Impeachment Rule XI

STATEMENT OF THE CASE

The impeachment trial clause of the Constitution, Article I, section 3, clause 6, creates a uniquely American constitutional structure, designed principally to balance the powers of the branches of government. The Framers closely limited the impeachment power to provide a meaningful check on the executive and judiciary while protecting them from legislative domination. To strike that balance, impeachment was designed to be a deliberate trial proceeding before the Senate.

Through its first 150 years, the Senate discharged its duty to "try all Impeachments" by conducting ten impeachment proceedings on the Senate floor, before the entire body. That practice implemented both the constitutional text and the Framers' view that in order to preserve judicial and executive independence, impeachment cannot be streamlined, but must be a Senate trial of specific charges based on evidence.

When Senate Impeachment Rule XI was applied to petitioner in 1989, the evidence on perjury charges was presented to a committee of only twelve senators, less than one-eighth of the Senate. Eighty-eight senators heard no testimony, viewed no witnesses, and could not evaluate witness

credibility in a "trial" to determine who was lying and who was telling the truth. The trial under Rule XI was an expedited proceeding fundamentally different from that intended by the Framers.

1. The Constitutional Convention Shapes American Impeachment

The Framers devoted considerable energy to what became the impeachment trial clause, debating it repeatedly from their opening sessions until the end of the Constitutional Convention. Although the Framers embraced the idea of impeachment, they struggled for months over what entity should have such ultimate power and how to control its exercise. The Senate trial — an admittedly ungainly solution — emerged slowly, after the delegates carefully considered alternatives and rejected proposals designed to expedite the removal of executive or judicial officers.

a. First Proposals

On May 29, 1787, Edmund Randolph of Virginia opened the "main business" of the Convention with a proposed plan known as the "Virginia Resolutions." 1 *Records of the Federal Convention* 18, 20 (M. Farrand ed. 1966) [hereinafter "Farrand"]. On impeachment, Randolph followed the Virginia Constitution, proposing trial of impeachments of "National officers" in judicial courts. *Id.* at 22; *Federal and State Constitutions*, H.R. Doc. No. 357, 59th Cong., 2nd Sess. (1909), vol. VII at 3818 [hereinafter "*State Constitutions*"]. A competing plan, offered on the same day by Charles Pinckney of South Carolina, proposed that the "Senators and Judges of the foederal Court, be a Court for trying Impeachments." 1 Farrand 23 & n.14; 3 Farrand 608. This proposal closely followed the impeachment trial provision contained in the South Carolina Constitution of 1778. *See State Constitutions*, *supra*, vol. VI at 3253.[1]

[1] The delegates knew state impeachment practice well. At least eight delegates had helped draft five state constitutions with impeachment

Four days later, John Dickinson, representing Delaware, moved to increase Congress' power to remove executive officials. Dickinson proposed that "the Executive be made removable by the National Legislature on the request of the majority of the Legislatures of individual States." 1 Farrand 85. George Mason protested that Dickinson's proposal would reduce the Executive to "the mere creature of the Legislature," *id.* at 86, and it was overwhelmingly defeated. *Id.* at 87.

On the same day, the delegates approved the motion of Hugh Williamson of North Carolina to make the executive "removable on impeachment and conviction of mal-practice or neglect of duty." *Id.* at 88. That language followed the impeachment provision in the North Carolina Constitution of 1776. *State Constitutions*, *supra*, vol. V at 2789-90. The Virginia Resolutions also were amended on June 13 to confide impeachment trials to the federal courts. 1 Farrand 223-24.[2]

b. The Committee Of Detail

Impeachment was not debated again until late July, after appointment of a Committee of Detail to prepare a draft Constitution. *See* 2 Farrand 106. The Committee's draft gave the

provisions: George Mason, Edmund Randolph and James Madison (Virginia); Gouverneur Morris (New York); Caleb Strong (Massachusetts); John Rutledge and Charles Cotesworth Pinckney (South Carolina); and William Paterson (New Jersey). Two others, James Wilson and Jared Ingersoll, had been defense counsel in a 1780 impeachment trial under the Pennsylvania Constitution of 1776. P. Hoffer & N. Hull, *Impeachment in America, 1615-1805* at 81 (1984). By 1787, ten states had constitutional impeachment provisions, and five state impeachment trials had been conducted, all principally before the upper house of the legislature. *Id.* at 68-95; *see generally State Constitutions*, *supra*, vols. I-VII.

[2] William Paterson of New Jersey presented an alternative constitutional plan on June 15 which provided that Executive officials would be "removable by Congress on application by a majority of the Executives of the several states," while placing trial of impeachments "in the first instance" "in the judicial courts." 1 Farrand 242, 244. In addition, Alexander Hamilton of New York offered an alternative impeachment mechanism on June 18. *Id.* at 282. Neither proposal was debated by the Convention.

House of Representatives "the sole Power of Impeachment," and placed impeachment trials in the Supreme Court. *Id.* at 178-79, 186.

On August 9, the Convention agreed, without debate, to grant the House the sole power of impeachment. *Id.* at 231. The impeachment trial proved more difficult to resolve. Elbridge Gerry of Massachusetts moved on August 20 that the Committee of Detail establish "a mode of trying the Supreme judges in cases of impeachment," since, if the Supreme Court were to conduct impeachment trials, trying Supreme Court judges could become awkward. *Id.* at 344. Rutledge, on behalf of the Committee of Detail, proposed that the Senate conduct the trials of Supreme Court judges. *Id.* at 367.

c. The Delegates Reject Removing Judges By "Address"

On August 27, John Dickinson was on his feet again, this time proposing to increase legislative power over the judiciary. Dickinson moved that federal judges be removed "by the Executive on the application by the Senate and the House of Representatives." *Id.* at 428. The proposal was copied from the British practice (followed in a few states) of removing judges by "address," without any charges or trial, on a majority legislative vote. *See* Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 *Sup. Ct. Rev.* 135, 137. Roger Sherman of Connecticut endorsed the idea, citing "the British statutes." 2 Farrand 428.

James Wilson objected, arguing that "Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Government." *Id.* at 429. Randolph, too, contended that Dickinson's proposal would "weaken[] too much the independence of the Judges." *Id.* Dickinson's motion was defeated by a 7-1 vote. *Id.*

d. The Final Version

The final impeachment trial clause emerged in a report issued by another drafting committee on September 4. The idea of a Senate trial plainly had taken root, as reflected in the provision that the Vice President "shall be ex officio President of the Senate, except when *they sit to try* the impeachment of the President." *Id.* at 498 (emphasis added).

The debate over the September 4 report centered on the dangers of giving too much power to the Senate. *Id.* at 500, 511, 522-24 (G. Morris; C. Pinckney; J. Rutledge; J. Wilson). But on September 8 the delegates rejected, 9-2, a motion by Madison to remove presidential impeachment trials from the Senate. *Id.* at 551. Gouverneur Morris then moved to add the requirement that senators "shall be on oath" for impeachment trials. *Id.* at 552. The final provision, approved by a 9-2 vote, stated (*id.*):

> The Senate of the United States shall have power to try all impeachments: but no person shall be convicted without the concurrence of two thirds of the members present: and every member shall be on oath.

Also on September 8, the delegates appointed a five-member committee "to revise the stile of and arrange the articles which had been agreed to by the House." 2 Farrand 553. In its draft of September 12, the Committee of Style inserted the word "sole" for the first time, giving the Senate "the sole power to try all impeachments." *Id.* at 592.

e. Post-Convention Statements

In the Federalist, Hamilton explained the Framers' ultimate determination to commit impeachment trials to the Senate and not to the Supreme Court. *The Federalist* No. 65, at 426 (B. Wright ed. 1961). He questioned whether Supreme Court judges "would at all times be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task," and whether "they would possess the degree of credit

and authority" necessary to reject impeachment charges brought by the "immediate representatives" of the people, the House of Representatives. *Id.* at 427. The solution, Hamilton wrote, was a "tribunal more numerous than would consist with a reasonable attention to economy." *Id.* at 428. This "numerous court" also was needed because of the immense power of impeachment: "The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons." *Id.*

The need for a "numerous court" derived from the Framers' belief that the preservation of liberty requires an independent judiciary. Hamilton noted that judges would be "tried by the Senate," which he called "the only provision on the point which is consistent with the necessary independence of the judicial character." *The Federalist* No. 79, at 498. Thus, Hamilton observed that life tenure for judges is an "excellent barrier to encroachments and oppressions of the representative body." Of the three branches, the judiciary "will always be the least dangerous to the political rights of the Constitution," and "all possible care is requisite to enable it to defend itself against [the other branches'] attacks." *The Federalist* No. 78, at 490-91. During the Convention, Madison also had argued that judges should not depend on Congress for reappointment "[b]ecause they might be tempted to cultivate the Legislature, by undue complaisance, and thus render the Legislature the virtual expositor, as well as the maker of the laws." 2 Farrand 34.

During the Pennsylvania Convention to ratify the Constitution, James Wilson defended the constitutional mandate that the Senate "must try all impeachments." II *Documentary History of the Ratification of the Constitution* 491 (M. Jensen ed. 1976); *id.* at 480 (Senate's duties include "trying impeachments"); *id.* at 568 (same). In a later lecture, Wilson noted that under both

the federal and Pennsylvania constitutions, "All impeachments shall be tried by the Senate." II *Works of James Wilson*, at 44-45 (J. Andrews ed. 1896). Wilson did not flinch at the prospect of a "numerous" court, tracing constitutional impeachment procedures to Athenian impeachments "prosecuted before the popular assembly, or before the senate of 500." *Id.* at 46.

2. Senate Impeachment Trials Until 1986

From 1798 through 1936, six out of ten impeachment trials resulted in acquittal (Justice Samuel Chase in 1805; Judge James Peck in 1831; President Andrew Johnson in 1868; former Secretary of War William Belknap in 1876; Judge Charles Swayne in 1905; and Judge Harold Louderback in 1933). Two essentially uncontested trials ended with convictions (Judge John Pickering in 1803; Judge West Humphreys in 1862), as did two other trials (Judge Robert Archbald in 1913 and Judge Halsted Ritter in 1936). The Senate abandoned two impeachment proceedings because the accused had left office (Sen. William Blount in 1798 and Judge George English in 1926).

a. The First 100 Years Of Trials

In the first century after the Philadelphia Convention, the Senate diligently conducted impeachment trials before the entire body, without any suggestion that a committee hear the evidence.[3] Through the first four impeachment proceedings, the Senate routinely referred to itself as a "High Court of Impeachment." 8 Annals of Cong. 2245 (1797) (Blount); 13

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[3] Contemporaneous state impeachments also did not use trial committees. *See generally* P. Hoffer & N. Hull, *supra*, at 78-95, 116-45, 164-77. For example, the Nicholson impeachment trial in 1793 was conducted for six weeks before the full Pennsylvania Senate. *Id.* at 138-39. During the 1788 Greenleaf impeachment, the Massachusetts State Senate heard evidence for nine days, *id.* at 125-26, while in the Osborne impeachment in Georgia in 1797, the State Senate heard "weeks" of testimony. *Id.* at 132-33. The South Carolina Senate observed full trial procedures during the 1793 Moultrie impeachment. *Id.* at 136.

Annals of Cong. 323 (1804) (Pickering); 14 Annals of Cong. 88 (1804) (Chase); A. Stansbury, *Report of the Trial of James H. Peck* 48-49 (DaCapo Press 1972) (Hilliard, Gray & Co. 1833). Indeed, the House of Representatives attended much of the Peck and Humphreys trials. *See id.* at 85, 93, 125, 126, 142, 161, 180, 188, 203, 221, 239, 267, 306, 327, 334, 371, 372, 425, 453, 523; A. Hinds, *Hinds' Precedents of the House of Representatives of the United States* § 2392 (1907) [hereinafter *"Hinds' Precedents"*].

In the first federal impeachment, that of Sen. William Blount in 1798, Sen. Henry Tazewell of Virginia moved that a lay jury be empaneled to hear the evidence. Tazewell reasoned that the Bill of Rights' guarantee of a jury trial superseded the Senate impeachment trial clause. Aurora General Advertiser, Feb. 20, 1798, p. 2, col. 2; *id.*, Feb. 28, p. 2, col. 2.

The Senate, however, hooted down the proposal. Sen. Elijah Paine of Vermont denounced "the monstrous absurdity of having thirty-two judges and twelve Jurors," and pointed to five state constitutions that simultaneously provided for both jury trial of criminal cases and Senate trial of impeachments. Aurora General Advertiser, Mar. 1, 1798, p. 2, col. 2; *id.* (Sen. Read) (same); *id.*, Feb. 28, 1798, p. 2, col. 2-3 (Sen. Ross) (same); *id.*, Feb. 20, 1798, p. 2, col. 4 (Sen. Mason) (same). The Tazewell proposal was defeated 26-3, keeping the trial before the Senate itself.

For the Chase trial in 1805, Vice President Burr designed the Senate's "seating arrangements to conform to those of a court." Burton, *An Independent Judiciary: The Keystone of Our Freedom*, 39 A.B.A.J. 1067, 1070 (Dec. 1953). Burr placed the senators on either side of his chair as presiding officer, facing the respondent and the House Managers. *Id.* Burr's seating arrangements were revived for the Humphreys trial in 1862.

Hinds' Precedents, at § 2392.[4] The attentiveness of the senators was praised at the early trials.[5]

The first complaints about Senate attendance arose at the Belknap trial in 1876, a unique proceeding almost calculated to discourage attendance. *Proceedings of the Senate Sitting for the Trial of William W. Belknap*, 4 Cong. Rec. (Pt. 7) 293-94, 44th Cong. 1st Sess. (1876) [hereinafter *"Belknap Proceedings"*]. On the first trial day, Belknap's counsel moved to dismiss the case because Belknap had resigned. The Senate narrowly voted to proceed, 37-29. *Id.* at 76. Since more than one-third of the Senate opposed trying Belknap at all, his acquittal was a foregone conclusion. Thomas, *The Law of Impeachment in the United States*, 2 Am. Pol. Sci. Rev. 378, 389 (1908); Brown, *The Impeachment of the Federal Judiciary*, 26 Harv. L. Rev. 684, 700 n.19 (1913); *see also Belknap Proceedings*, at 171-73, 293-94.

b. The Early Twentieth Century Senate Trials

In the four impeachment trials before the Senate in this century, attendance occasionally was criticized. *See, e.g., Proceedings in the Senate of the United States in the Matter of the Impeachment of Charles Swayne*, S. Doc. No. 194, 58th Cong. 3rd Sess. 14, 631 (1905) [hereinafter *"Swayne Proceed-*

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[4] The trial of Judge Humphreys, who had accepted a commission as a Confederate judge and did not appear for his trial, was conducted at a time of great national urgency. During the trial in May and June of 1862, Confederate armies won victories at Winchester, Virginia, due west of the Capitol, and at Seven Pines, Virginia, one hundred miles south. During this period, the Senate also debated the prohibition of slavery in the territories. Cong. Globe, 37th Cong., 2nd Sess. 2618 (1862). Still, the Senate heard Humphreys' trial to conclusion.

[5] *Proceedings on the Impeachment of William Blount* 75 (Philadelphia, J. Gales ed. 1799) [hereinafter *"Blount Proceedings"*] (defense counsel Ingersoll); 14 Annals of Cong. 310 (1805) (Chase trial) (remarks by Chase, J.); *id.* at 584 (House Manager Rodney); Stansbury, *supra*, at 475 (Peck trial) (defense counsel Wirt).

ings"]. The Senate developed several procedures for dealing with the question. Quorum calls were employed to bring Senators into the chamber, since no official Senate business may be conducted in the recognized absence of a quorum.[6] The Senate heard testimony at night and on Saturdays to accelerate the trials.[7] Senators who missed the trial proceedings often were excused from voting on the articles.[8] Still, many senators acknowledged their obligation to hear the evidence as jurors,[9] echoing views expressed in earlier impeachment trials.[10] In-

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[6] *E.g.*, *Belknap Proceedings*, at 219, 314; *Swayne Proceedings*, at 568, 571, 631, 662; *Proceedings of the U.S. Senate and the House of Representatives in the Impeachment of Robert W. Archbald*, S. Doc. No. 1140, 62nd Cong., 3rd Sess. 97, 128-29, 159-60, 176, 201, 232, 292, 387, 718, 1219-20 (1913) [hereinafter *"Archbald Proceedings"*]; *Proceedings of the United States Senate in the Trial of Impeachment of Harold Louderback*, S. Doc. No. 73, 72nd Cong., 2nd Sess., 73rd Cong., 1st Sess. 141, 213, 245, 248, 331, 375, 388, 529-30, 713-14, 778, 814 (1933) [hereinafter *"Louderback Proceedings"*]; *Proceedings of the United States Senate in the Trial of the Impeachment of Halsted L. Ritter*, S. Doc. No. 200, 74th Cong., 2nd Sess. 3-4, 27-30, 47-48, 77-78, 95, 137-38, 203, 225, 324, 344-45, 393-94, 415, 467-68, 492-93, 534, 555, 598-99, 621-22, 628 (1936) [hereinafter *"Ritter Proceedings"*].

[7] *Belknap Proceedings*, at 74, 75, 202; *Swayne Proceedings*, at 569; *Archbald Proceedings*, at 292, 757; *Ritter Proceedings*, at 467-68, 492-93.

[8] One senator was excused from voting on Judge Swayne, *Swayne Proceedings*, at 716; eight senators were excused from voting in Judge Archbald's case because they had not heard the testimony, *Archbald Proceedings*, at 1394, 1515, 1620-21; fifteen senators were excused from voting on all or some of the Louderback charges for the same reason, *Louderback Proceedings*, at 771-72, 823-36; and Sen. Tydings was excused from voting at the Ritter trial, *Ritter Proceedings*, at 15.

[9] *Louderback Proceedings*, at 823 (Sen. Glass); *id.* at *837* (Sen. Bailey); *Ritter Proceedings*, at *657* (Sen. Benson); *Swayne Proceedings*, at 485 (Sen. Bate).

[10] 14 Annals of Cong. 597 (1805) (Chase trial) (House Manager Rodney); Cong. Globe, 40th Cong., 2nd Sess. 424 (1868) (Johnson trial) (Sen. Edmunds).

deed, when Vice President Garner commented on certain evidence against Judge Ritter, he noted that the Senate "is sitting as a jury," albeit "a jury which will not be influenced by statements of that kind." *Ritter Proceedings*, at 547-48.

The Senate's diligence is highlighted in the Louderback trial in 1933, which extended for 76 of the first "100 Days" of Franklin Roosevelt's first administration, one of the busiest legislative periods in history. Even in that trial, however, the Senate again emphasized the need for Senators to receive testimony directly. In fact, when Judge Louderback sought permission to take the deposition of W.S. Leake, a Californian in very poor health, the House Managers insisted on live testimony from Leake, arguing that "it is of prime importance in this matter that if this man Leake's testimony be taken, it be taken before the trial body," so that "his demeanor and testimony be examined." *Louderback Proceedings*, at 144. The Senate agreed that Leake had to testify in person, before the entire Senate, and unanimously ordered his arrest so the Senate "may properly execute the functions imposed upon it." *Id.* at 270. Leake was arrested and brought to the Senate to testify. *Id.* at 631-32.

3. Adopting Senate Impeachment Rule XI: 1934-35

After the Louderback trial, the Judiciary Committee proposed a new Impeachment Rule XI to allow a committee of twelve senators to hear and report on the evidence in an impeachment case.[11] Under Rule XI, the Senate votes on the impeachment articles after receiving the committee's report of the evidence and hearing closing arguments.

The debate on Rule XI revealed considerable doubt about its constitutionality. Echoing the demand for live testimony during the Louderback trial, Sen. Hiram Johnson insisted that "a trial of the questions of fact . . . depends quite as much upon

[11] The committee hearing option was first mentioned in 1904, *see* 38 Cong. Rec. 3660 (1904) (Sen. Hoar), but was not pursued until the Louderback trial was completed.

the witnesses who are called, their appearance on the stand, [and] their mode of giving testimony." 78 Cong. Rec. 9432 (1934). Johnson asked whether in "a matter of such grave concern and importance, is it well for us to indulge in a trial, as it were, vicarious in character, which really will be conducted by a committee?" Senator Borah of Idaho went further, stating that "the Senate is the body which tries the respondent, not a subcommittee or a committee of the Senate; and therefore the respondent would be entitled to a full trial in every respect before the entire Senate if he should ask for it." 78 Cong. Rec. 9928 (1934); *see also id.* at 9929 (remarks of Sen. Fletcher).[12]

When the Ritter impeachment was to be tried in 1936, the Senate again debated Rule XI. Sen. Austin of Vermont, a member of the Judiciary Committee, recognized that "there is so much doubt about the constitutionality of the resolution," 80 Cong. Rec. 3425 (1936), and cautioned that "the Senate cannot by resolution do away with the right of the individual who becomes a respondent in an impeachment proceeding. The Senate might constitutionally waive its rights, but when it undertakes to waive or do away with the rights of a respondent under the law...we cannot do it." *Id.* Sen. Ashurst, the Judiciary Committee Chairman and chief proponent of Rule XI, admitted that "[a] considerable division of opinion exists as to whether the Senate possesses the power to have the testimony in impeachment trials taken by committee." *Id.* at 3424.

Ashurst observed that Rule XI was intended to "simplify the work" of the Senate after Louderback's "dreary, involved, and protracted" trial, but he agreed that Rule XI could be used only "if and when the respondent was willing thus to have the testimony taken by a committee and the managers also were thus willing." *Id.* at 3426. Ashurst pledged, "I would not vote that a special committee should be appointed to take the testimony

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[12] Two senators disagreed. *See* 78 Cong. Rec. 9928 (1934) (Sen. Robinson); *id.* at 9929 (Sen. Norris).

unless the respondent and the managers requested that such be done." *Id.* at 3425-26. No senator disagreed.

4. Rule XI: The 88 Senators Who Do Not Hear The Evidence Disproportionately Favor The Prosecution

Judge Ritter's case in 1936 was not referred to a Rule XI committee. But when the next impeachment trial arose fifty years later, Harry Claiborne was denied a trial before the full Senate, as were Alcee Hastings and petitioner in 1989.[13]

In the Claiborne, Hastings, and Nixon cases, there were significant differences between the votes of the senators who sat on the Rule XI committees and the votes of the other senators. In each, the eighty-eight senators not on the Rule XI committee disproportionately favored the prosecution. *See* Pet. Br. App. B (table of votes); Pet. Br. App. C (bar graph). On seventeen out of eighteen articles, the senators who actually heard and saw

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[13] Individual senators continue to question the constitutionality of Rule XI. Sen. Heflin, a committee member in both the Claiborne and Nixon trials, has stated that the Framers "intended that the Senate conduct a full judicial trial on the Senate floor," Heflin, *The Impeachment Process: Modernizing an Archaic System*, 71 Judicature 123 (Aug.-Sept. 1987), and has compared the 88 Senators who do not hear the evidence to "sleeping jurors." Heflin, *Impeaching Federal Judges: Making the Case for Change*, Trial 32, 34 (Nov. 1990). *See also* 132 Cong. Rec. 32628 (1986) (Sen. Levin) (Senate should not "make findings in those disputed areas where witness demeanor or credibility is critical. . . . The Senate, as a finder of fact, did not hear or see a single witness. And, as a result, our ability to fairly reach decisions, when the facts were in dispute, was restricted."); 132 Cong. Rec. 32625 (1986) (Sen. Evans) ("Although all 100 of us sat in judgment, only a chosen few heard testimony or examined witnesses."); 132 Cong. Rec. 29873 (1986)(Sen. Bingaman) ("essential to hear witnesses and judge the credibility of those witnesses. . . . [P]utting the record of evidence presented to the committee into the possession of all Senators is not an adequate substitute.")

the evidence voted to acquit in significantly greater proportions than did the other senators.[14]

This variation between committee members and other senators is not a mere statistical curiosity, but often reflects the difference between winning and losing. Of the ten impeachment articles on which Hastings and Nixon were convicted, nine failed to carry a two-thirds majority of the committee members. *See* Pet. App. B, at 62a. If the Senate's vote had reflected the same distribution as the votes of the senators who heard the evidence, Hastings would have been acquitted on all charges, and Nixon would have been acquitted on two of three articles.

5. Impeachment Proceedings Against Nixon

On May 10, 1989, the House of Representatives adopted three articles of impeachment against Nixon. H. R. Res. 87, 101st Cong., 1st Sess., 135 Cong. Rec. H1802-03, 1811 (daily ed. May 10, 1989), *reprinted in Impeachment of Judge Walter L. Nixon, Jr.*, S. Doc. No. 8, 101st Cong., 1st Sess., 19-25 (1989).[15] The first two articles were based on perjury charges on which Nixon was convicted in 1986. Impeachment Article III, an "omnibus" article, charged that Nixon made "one or more" of 14 alleged false or misleading statements in an FBI interview and grand jury testimony. The articles were exhibited in the Senate on May 16, 1989.

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[14] On the eighteenth Article (Article XVI against Judge Hastings), the committee members and non-committee members both voted unanimously to acquit. The votes described here, and in Pet. Br. App. B and Pet. Br. App. C, are reported in the Congressional Record. *See* Jt. App. C, at 12a-33a (Nixon vote); 135 Cong. Rec. S13782-88 (daily ed. Oct. 20, 1989) (Hastings vote); 132 Cong. Rec. 29870-73 (1986) (Claiborne vote).

[15] The record of proceedings in the Senate consists of thirteen volumes. The volumes, which were marked as Appendix 4 to Plaintiff's Motion for Summary Judgment filed with the District Court on Feb. 20, 1990, also include all proceedings in the House and in the courts. Three additional sets of the 13-volume impeachment record were lodged with the Court of Appeals below.

The Senate adopted Resolution 128 pursuant to Impeachment Rule XI, appointing a committee of twelve senators "to receive and to report evidence." *See* S. Res. 128, 101st Cong., 1st Sess., 135 Cong. Rec. S5133-34 (daily ed. May 11, 1989), *reprinted in Report of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.*, S. Rep. No. 164, 101st Cong., 1st Sess. 97-98 (1989) [hereinafter "Imp. Rec., Comm. Report"]. On July 25, 1989, after oral argument, the Rule XI Committee denied Nixon's motion for trial before the full Senate. *Hearings Before the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge Walter L. Nixon, Jr.*, S. Hrg. No. 247, 101st Cong., 1st Sess., Pt. 1 at 319-21 (1989) [hereinafter "Imp. Rec., Pt. __"].

The Rule XI Committee heard ten witnesses on September 7, 8, 12 and 13, with a quorum of seven members required for each session. *Id.*, Pt. 2. The committee also received the record of the criminal trial, post-conviction proceeding, and House impeachment hearings. *Id.*, Pts. 3, 4A (Vols. I and II), 4B (Vols. I, II and III), and 4C. Although the hearing was televised to Senate offices and videotaped, "[t]he record is silent as to how many Senators took advantage of these opportunities to view the committee proceedings." Pet. App. B, at 60a.

6. The Charges Against Nixon Turned Entirely On Credibility

As with any perjury case, Nixon's turned on who was believed, the accused or the accuser. In March 1983, Nixon visited Wiley Fairchild, a businessman with whom he had made an investment some years before. Fairchild said that Paul "Bud" Holmes, a local prosecutor and friend of Nixon's, was "blackmailing" him concerning a drug prosecution of Fairchild's son Drew. Fairchild did not ask Nixon to do anything about the situation.[16]

[16] Imp. Rec., Pt. 2 at 54-55, 60, 63, 86, 232-233, 249-50, 297; Pt. 4A, Vol. I at 481-84, 640-41, 643; Pt. 4A, Vol. II at 1536; Pt. 4B, Vol. I at 208-09, 434.

When Nixon saw Holmes later that day at Holmes' farm, he mentioned Fairchild's blackmail accusation. Holmes said Fairchild was "crazy" and offered to explain the drug case. Nixon responded that he did not want to discuss it.[17] Out of Nixon's hearing, Holmes telephoned Fairchild to say that he would honor a previous plea bargain with Drew Fairchild. Holmes then called Nixon to the telephone, and Nixon heard Fairchild thank him for raising the blackmail matter and say he was satisfied.[18]

The FBI began an investigation in early 1984 after receiving anonymous calls falsely accusing Nixon of accepting a gratuity to influence the Drew Fairchild case.[19] The accusations were leaked to the press, triggering intense media coverage.

Nixon volunteered to be the first witness before the investigating grand jury.[20] He testified fully, with supporting documentation, about his transaction with Wiley Fairchild. On the Drew Fairchild case, he said that he knew from the news media that it was the subject of unexplained delays; that state prosecutor Holmes was a friend; and that he had done nothing to influence the case.[21]

When asked whether Holmes had discussed the Drew Fairchild case with him, Nixon said no. As Nixon explained to

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[17] *Id.*, Pt. 2 at 145-46, 151, 235, 251, 253; Pt. 4A, Vol. II at 1539-1540; Pt. 4B, Vol. I at 305, 435, 437.

[18] *Id.*, Pt. 2 at 99, 101, 114, 236; Pt. 4A, Vol. I at 636, 739; Pt. 4A, Vol. II at 1542; Pt. 4B, Vol. I at 179-180, 246.

[19] *Id.*, Pt. 2 at 17, 28, 30; Pt. 3 at 501, 572-73, 1136, 1263, 1517; Pt. 4A, Vol. I at 275-76, 299.

[20] *Id.*, Pt. 2 at 18, 36-41, 44-45, 134, 240; Pt. 3 at 28-29, 32, 42-46, 1537-39; Pt. 4A, Vol. I at 811-12; Pt. 4A, Vol. II at 1710; Pt. 4B, Vol. I at 443, 449-50.

[21] *Id.*, Pt. 2, at 241, 288, 297; Pt. 3 at 53-98, 142, 432; Pt. 4B, Vol. I at 452-53.

the Rule XI Committee, he was preoccupied at the time by the false charge that his investment was tied to the drug prosecution. The questions on that subject did not prompt his recall of the brief conversations on the related, but distinct, subject of Holmes' "blackmail" of Wiley Fairchild.[22]

Nixon was indicted for accepting a gratuity from Wiley Fairchild, and on three counts of lying to the grand jury. He was acquitted on the gratuity charge and one perjury charge. Imp. Rec., Pt. 3 at 317-18.

The remaining perjury counts depended on Holmes' testimony about the conversations at his farm. Holmes himself had been indicted on five perjury counts for *his* grand jury testimony, but pled guilty to a single contempt charge in return for testifying against Nixon. Holmes claimed that Nixon had asked him to "put in a good word" for Fairchild's son, and that, after Nixon's grand jury appearance, Nixon asked him not to divulge their conversation about Drew's case.[23] Nixon denied ever seeking to influence the Drew Fairchild prosecution or to silence Holmes, and disputed Holmes' version of the conversations.[24] Nonetheless, Nixon was convicted on two counts of perjury.

In the Rule XI hearing, Holmes again contradicted Nixon. Holmes also admitted that he lied three times in the grand jury, lied again in a sworn deposition, and lied yet again in a sworn affidavit prepared for the impeachment. When asked which of

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[22] *Id.*, Pt. 2 at 241, 252, 280-81, 287-88, 316-17; Pt. 3 at 48-106; Pt. 4B, Vol. I at 467-69. Although the prosecutors were aware of the conversations at issue when they questioned Nixon, for undisclosed reasons they never asked him directly about them. *Id.*, Pt. 2, 175; Pt. 3, 53-144, 836-838.

[23] *Id.*, Pt. 2 at 138, 242-43; Pt. 3 at 290-91, 432; Pt. 4A, Vol. I at 813-17; Pt. 4B, Vol. I at 291; Pt. 4B, Vol. II at 997-1005; Imp. Rec., Comm. Report at 70-71.

[24] Imp. Rec., Pt. 4A, Vol. II, at 1539-40, 1546-47, 1558, 1570, 1575, 1589-91, 1599-1600.

his contradictory sworn statements was true, Holmes replied, "You can use any one you want."[25]

Wiley Fairchild, who also disputed certain of Nixon's recollections, has testified that he lied to the federal prosecutors, lied to the grand jury, and lied at Nixon's criminal trial. Yet he told the Rule XI Committee that he has *always* told the truth in this case.[26] One court has described Fairchild's testimony as "self-contradictory, puzzling and incredible." *Nixon v. United States*, 703 F. Supp. 538, 553 (S.D. Miss. 1988), *aff'd*, 881 F.2d 1305 (5th Cir. 1989).

In its report, the Rule XI Committee cautioned that knowledge of the contradictory testimony was "critical" (Imp. Rec., Comm. Report at 18-19): "Many specific details — including some that are very important — about each of these conversations are disputed by the parties. Indeed, the committee received dramatically inconsistent testimony concerning the substance, date, and result of these conversations . . . ."

Echoing these remarks, one Committee member, who voted to acquit on two articles, stated that "the cast of characters in this case also poses serious problems of credibility." *Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr.*, S. Doc. No. 22, 101st Cong., 1st Sess. 459-60 (1989) (Sen. Murkowski) [hereinafter "Imp. Rec., Proceedings"]. For that senator, Wiley Fairchild "has failing memory and has given various versions of the facts since 1984," while Bud Holmes "has given so many versions of certain facts that he suggested the Senate panel could cho[o]se whichever ones we felt comfortable with." In contrast, the senator noted, "I had the chance to observe Judge Nixon as he testified. He seemed to be a decent, civil man, perhaps more so than those who testified against him." *Id.* Eighty-eight colleagues, how-

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[25] Imp. Rec., Comm. Report at 33; Imp. Rec., Pt. 2 at 144; *id.*, Pt. 4B, Vol. 1 at 310-15.

[26] Imp. Rec., Pt. 2, at 75; Pt. 4A, Vol. I, at 522.

ever, could not take the same careful measure of the witnesses and their evidence.

Perhaps inadvertently, the Committee Report heightened the senators' need to hear the evidence by erroneously suggesting that Nixon's testimony "contrast[ed]" with his own trial testimony. Imp. Rec., Comm. Report at 74. In fact, his testimony did not change, but the committee report omitted material passages of his trial testimony. *See* Imp. Rec., Proceedings, at 173-92 (comparison of testimony).

7. Post-Hearing Activity And Vote

On November 1, the full Senate heard closing arguments by the House Managers, counsel for Nixon, and briefly, Nixon himself. However, "the Senate, as such, did not see witnesses and hear their testimony." Pet. App. B, at 59a. After the arguments, the President Pro Tempore addressed to counsel written questions from senators. The entire session took less than four hours. Imp. Rec., Proceedings at 357-422; 135 Cong. Rec. S14493-517 (daily ed. Nov. 1, 1989).

The Senate deliberated in executive session the following day, coming back on November 3 to vote. The Senate first voted 90-7 to deny Nixon's motion for trial before the full Senate. *See* Jt. App. C, at 16a-18a. The Senate then voted to convict on the first two articles by margins of 89-8 and 78-19, respectively. *Id.* at 22a-27a. Based largely on objections to the form of Article III, which confusingly duplicated the first two articles, the Senate acquitted on that article. *Id.* at 27a-32a. *See also* Imp. Rec., Proceedings at 429-34; 135 Cong. Rec. S14634-35 (daily ed. Nov. 3, 1989); *id.* at 457-58 (Sen. Dole); *id.* at 449-50 (Sen. Kohl); *id.* at 458-59 (Sen. Biden); *id.* at 464 (Sen. Murkowski).

The convictions were certified and deposited with respondent Baker. Respondent Mecham, as Director of the Administrative Office of the United States Courts, terminated Nixon's salary and benefits as a District Judge.

8. Prior Court Proceedings

On June 1, 1989, Judge Alcee Hastings sued the Senate and several Senate employees, raising eleven challenges to the impeachment proceedings against him. Nixon intervened, challenging only the Rule XI procedure. The district court dismissed the action. *Hastings v. United States Senate*, 716 F. Supp. 38 (D.D.C. 1989) (Pet. App. C, at 70a-78a). The court of appeals affirmed on the sole ground that the action was premature, since neither plaintiff had yet been removed from office. *Hastings v. United States Senate*, No. 89-5188 (D.C. Cir. 1989) (Pet. App. D, at 79a-82a).

Following his Senate conviction, Nixon brought this declaratory action. The district court expressed considerable agreement with Nixon's constitutional claim, but held the action nonjusticiable. *See* Pet. App. B.

The court of appeals affirmed, with the panel writing three separate opinions. The court opinion by Judge Williams held that the case presented a nonjusticiable political question. Since the Framers selected the Senate over the Supreme Court to conduct impeachment trials, Judge Williams inferred that they must have intended for the courts to be powerless concerning impeachments. He distinguished *Powell v. McCormack*, 395 U.S. 486 (1969), noting that the House of Representatives had exceeded a textual limitation on its authority to judge members' qualifications. In a concurrence, Judge Randolph doubted that the political question doctrine applied, but held that since the courts were not identified in the Constitution as having any authority over impeachments, they may not review those proceedings.

Judge Edwards disagreed with his colleagues on justiciability. Pointing to *Powell*, he wrote, "[i]t is the court's task to interpret and give content to the word 'try' [in the Impeachment Clause], just as it was the Court's job in *Powell* to give meaning to the word 'Qualifications'" in Article I, section 5.

Pet. App. A, at 34a. Judge Edwards concluded, however, that receiving evidence through a committee hearing "can be accommodated" within the impeachment clause. *Id.* at 48a.

Nixon filed a timely petition for rehearing, which was denied on August 5, 1991. Pet. App. E, at 83a. The Petition for Writ of Certiorari was filed on November 4, 1991, and granted on February 24, 1992.

SUMMARY OF ARGUMENT

Under this Court's decisions, this case is fully justiciable if the Senate has violated a textual limitation on its impeachment powers. *Powell v. McCormack*, 395 U.S. 486 (1969). Accordingly, we first examine whether Impeachment Rule XI violates the impeachment trial clause, and then address justiciability.

The constitutional history of the impeachment clause and the unbroken practice of the Senate for 150 years demonstrate that the Framers intended that the Senate itself, and not a committee of a few senators, actually see and hear the evidence in an impeachment trial. A committee hearing, followed by a Senate vote, is not trial by the Senate.

In establishing a new form of constitutional government, the Framers worried most about how to control government power. By separating governmental powers among three coordinate branches, the Framers limited the powers exercised by any one official or group of officials.

The question persisted, however, of how to remove corrupt or abusive individuals from positions of trust. Although periodic elections would allow the people to remove miscreant legislators, executive and judicial officials were not so easily recalled. Removing judges, in particular, posed a thorny problem. The Framers prized judicial independence and sought to protect it with life tenure. But not even judges could be left completely uncontrolled in the Framers' "carefully crafted sys-

tem of checked and balanced power." *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647, 659 (1989).

The impeachment process was designed to provide the needed limit on executive and judicial officers, but to be only an extraordinary remedy. The Framers mistrusted legislative bodies, too, believing "the powers conferred on Congress were the powers to be most carefully circumscribed." *INS v. Chadha*, 462 U.S. 919, 947 (1983). Accordingly, they hedged the impeachment power with numerous restrictions designed to ensure that it could not become a tool of legislative tyranny.

One of the principal restrictions on the Senate's impeachment power is at issue here: the requirement that the Senate may remove only those officers who have been proved, at a Senate trial, to have committed impeachable offenses. The language of the Constitution unmistakably directs the Senate itself to conduct a judicial-type trial in impeachment cases. The Senate is to "try" an impeachment "case" before senators who are "present" and "sitting" on "oath," over whom the Chief Justice may "preside," and whose decision is to "convict" or acquit. U.S. Const., Art. I, § 3, cl. 6 & 7; Art. II, § 4; Art. III, § 2, cl. 3, & § 3, cl. 1. All of these terms reflect the Framers' central intention that the power to remove judicial and executive officials be exercised with great deliberation, only after a trial by the Senate and a two-thirds vote to convict.

By providing that eighty-eight senators never hear the evidence in an impeachment case, Rule XI fundamentally disrupts this careful constitutional structure, upsetting the balance of powers that the Framers prescribed and that the Senate respected in its conduct of impeachment trials through its first 150 years. That balance is particularly critical when the judiciary, the "least dangerous branch," is threatened by the Senate's violation of the textual restrictions on its power to remove judges.

Acting under Rule XI, the Senate could not make the credibility determinations that lay at the heart of the perjury case against Nixon, and that will lie at the center of the "white-collar" prosecutions that are likely to arise against judicial or executive officers. Unfamiliar with the facts of the case or the witnesses, and unable to determine the weight to be accorded to conflicting testimony, the Senate's vote under Rule XI no longer resembles the careful exercise of judgment — a finding of facts based on evidence — demanded both by the Framers and by the gravity of the constitutional confrontation. Rather, it closely resembles the removal of judges by "address," based on political criteria and expediency. But removal by address was specifically rejected by the Philadelphia Convention. Such a plain violation of the Constitution cannot be justified by any desire to lighten the burdens of office for senators.

Because this case concerns whether the Senate has violated a textual limitation on its impeachment trial powers, it is the "province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The political significance of the underlying issue does not transform this case into a nonjusticiable political question. *United States Dep't of Commerce v. Montana*, 60 U.S.L.W. 4279, 4283-84 (U.S. March 31, 1992). Indeed, judicial review is especially critical in cases like this, which concern the separation of powers. Without judicial review, individuals would have nowhere to turn when the executive or legislative branches exceed the textual limits on their powers. Just as the courts may review the Senate's exercise of its power to legislate, or its power to judge its members' qualifications, they may review this case.

Under Rule XI, impeachment becomes easy, conviction is politically expedient, judicial independence is sapped, and the constitutional balance of powers is tilted forever. This case was brought, in the first instance, to vindicate the rights of a former

district judge from south Mississippi. But at issue is whether the nation will preserve its historic separation of powers by enforcing the constitutional limits on the Senate's power to remove executive and judicial officers.

ARGUMENT

I. TRIAL BY COMMITTEE IS UNCONSTITUTIONAL

A. Constitutional Text

The terms of the Constitution establish that the Framers meant for the Senate, and not a small fraction of that body, to conduct impeachment trials. Every constitutional provision that refers to impeachment trials reinforces the plain meaning of Article I, section 3, clause 6, that the full Senate must conduct a judicial trial of an impeachment case:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

The Constitution thus commands "the Senate" to "try all Impeachments." This Court must give full weight to the Framers' selection of the verb "try" to describe the Senate's obligation. "Try" means more than simply "vote on" or "review" or "judge." In 1787 and today, trying a case means hearing the evidence, not scanning a cold record. Thus Hamilton described the Senate, in trying impeachments, as acting in a "judicial character as a court" and conducting an "inquest." *The Federalist* No. 65, at 426-27 (B. Wright ed. 1961).

The other components of the impeachment clause similarly reflect the basic understanding that the Senate itself must con-

duct the trial. The clause describes the Senate as "sitting" for and "present" at impeachment trials. But under Rule XI, the Senate neither "sits" nor is "present" at the receipt of evidence.

The impeachment clause directs the Chief Justice, rather than the Vice-President, to "preside" over Senate trials in presidential impeachments. Surely the Chief Justice was not expected to "preside" over a committee of twelve senators. Because the text does not establish a lesser trial requirement for judicial impeachments, those proceedings also must be conducted before the entire Senate.[27]

That "try" did not mean merely to "judge" or "vote on," but instead contemplated the Senate's actually seeing and hearing evidence, is confirmed by the separate requirement of a two-thirds majority vote to "convict[]." If "try" meant only to judge or vote, as in the English practice of removing judges by address, the Framers would not have distinguished between the Senate's duty to "try" the case and the vote needed to convict. C. Black, *Impeachment: A Handbook* 10 (1974) ("The Senate is to 'try' all impeachments, not simply vote on them."). The impeachment clause thus contrasts with the Senate's power to be "the Judge of the Elections, Returns, and Qualifications of its own Members." U.S. Const., Art. I, § 5, cl. 1. Although that provision requires only that the Senate render an "independent final judgment," *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972), the impeachment clause demands more: that the Senate "try" the case and "convict[ ]" or acquit.

The impeachment clause also requires all senators, like jurors, to "be on Oath or Affirmation." This parallel between Senate impeachment trials and jury trials is explicit in Article

[27] This point is driven home by the wording of the resolution agreed to by the Convention: "the vice-president shall preside over the Senate except when *they sit to try the impeachment of the President*, in which case the Chief Justice shall preside." *See supra* p. 6 (emphasis added). Although the Committee of Style rearranged this language, those changes cannot be construed as substantive. *See infra* pp. 41-42.

III, section 2, clause 3: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." That provision contemplates that the trial body — be it the jury in criminal cases or the Senate in impeachment cases — actually hear the evidence of guilt or innocence. Equally, the provision refers to impeachment "Cases," a judicial term.

Article II, section 4 provides that the "President, Vice President and all civil officers" shall be removed from office "on impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Again, the accused must be "convicted," an outcome of judicial trials based on evidence. Moreover, the specified impeachable offenses are discrete criminal acts or episodes of official misconduct ordinarily proved through trial, not by informal legislative inquiry.

Indeed, Article III, section 3 explicitly connects convictions to the hearing of evidence by directing that "No Person shall be *convicted* of Treason unless on the *Testimony of Two Witnesses*". (Emphasis added.) Just as a treason conviction requires the hearing of "testimony" by "witnesses," so must a conviction in an impeachment case be based on the evidence seen and testimony heard by the Senate. Moreover, because treason is an impeachable offense, the treason clause would permit the Senate to "convict" in treason cases only after hearing the testimony of at least two accusing witnesses, which is contrary to the procedure prescribed by Rule XI.

The jury trial provisions of the Bill of Rights reinforce this textual analysis. The Seventh Amendment provides: "In suits at common law . . . the right of *trial* by jury shall be preserved, and *no fact tried by a jury* shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (Emphasis added.) The Framers surely intended that facts tried by the Senate, like "facts tried by a jury," would be found on the basis of testimony heard and evidence viewed.

The Sixth Amendment guarantees "a speedy and public *trial*, by an impartial jury," and decrees that the accused shall be "confronted with the *witnesses* against him and to have compulsory process for obtaining *witnesses*." (Emphasis added.) That trial guarantee is tied directly to the presentation of witnesses to "an impartial jury," just as the senator/jurors must hear the witnesses in an impeachment trial.[28]

Within the four corners of the Constitution, the overwhelming evidence shows that the Framers deliberately selected the verb "try" to direct the Senate to conduct a judicial-type trial in impeachment "cases," over which the Chief Justice may "preside," with senators "present" and "sitting" on "oath," deciding whether to "convict" or acquit. A Rule XI proceeding does not meet these clear specifications.

B. Senate Impeachment Trials Preserve The Separation Of Powers

Why did the Framers insist that the Senate, as a "numerous court," conduct an impeachment trial that was intended *not* to be consistent "with a reasonable attention to economy"? The Framers' choice of this unwieldy process was not based on obsessive proceduralism, or a perverse desire to obstruct the smooth functioning of government. Rather, the Senate trial was adopted because the Framers feared giving the ultimate power

[28] Late Eighteenth Century usage further supports the interpretation of "try" as involving direct presentation of witnesses and other evidence to the decisionmaker. *See* T. Sheriden, *A Dictionary Of The English Language* (1780) ("to try" means "to examine as a judge; to bring before a judicial tribunal"). Blackstone defined "trial" as "the examination of the matter of fact in issue," and observed that the "best method of trial, as the best evidence upon that trial," is required. III *Blackstone's Commentaries on the Laws of England* 330 (6th ed. 1775). This same usage persists today. *See, e.g., Black's Law Dictionary* 1516 (6th ed. 1990) ("To examine judicially. To examine and investigate a controversy, by the legal method called 'trial,' for the purpose of determining the issues it involves."); *see also* C. Black, *Impeachment: A Handbook* 10 (1974) ("the word 'try' is a word used almost invariably with regard to judicial trials").

of impeachment to any branch of government. Even the supposedly more deliberative Senate could not be trusted with complete power to remove executive and judicial officials. That immense power could be exercised only if the Senate, after a trial, convicted the official of specific offenses by a two-thirds majority. *See* 2 Farrand 428-29. Only this arduous process for removing judges would be "consistent with the necessary independence of the judicial character." *The Federalist* No. 79, at 498 (Hamilton).

The Constitution is a "carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. at 659; *accord, e.g., Buckley v. Valeo*, 424 U.S. 1, 124 (1976). The principle of checks and balances grew from the Framers' view that "[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, at 336 (B. Wright ed. 1961) (Madison); *accord Mistretta*, 488 U.S. 361, 109 S. Ct. at 659-60.

The Framers strongly mistrusted legislatures. Because "[i]n republican government, the legislative authority necessarily predominates," *The Federalist* No. 51, at 356 (Madison), it was "the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed." *Chadha*, 462 U.S. at 947; *see also Mistretta*, 488 U.S. 361, 109 S. Ct. at 660. ("[T]he Framers recognized the particular danger of the Legislative Branch's accreting to itself judicial or executive power . . . ."); *Morrison v. Olson*, 487 U.S. 654, 698-99 (1988) (Scalia, J., dissenting) (Framers "weakened the legislature" to counteract its tendency to assume powers).

The Framers also believed that the judiciary, in particular, would be vulnerable to legislative overreaching. Hamilton

stressed that "all possible care is requisite to enable it [the judicial branch] to defend itself against their attacks." *The Federalist* No. 78, at 491 (Hamilton).

These critical concerns drove the Philadelphia Convention to reject John Dickinson's proposal that judges be removed by "address" through a majority legislative vote, with no trial at all. *See supra* p. 5. The delegates objected that Dickinson's proposal would subject the courts to "every gust of faction" and "weaken[] too much the independence of the Judges." Earlier, they had rejected a comparable Dickinson proposal for the expeditious removal of executive officers, protesting that it would make the executive "the mere creature of the Legislature." 1 Farrand 85-86.

The Senate trial emerged as a central element of the "carefully crafted system of checked and balanced power" by guarding against legislative tyranny. To ensure the responsible exercise of the awesome power to remove officers from other branches of government, the Senate must act in a "judicial character as a court." *The Federalist* No. 65, at 426 (Hamilton). Impeachment is a "NATIONAL INQUEST into the conduct of public men," the result of which must be a "real demonstration[] of innocence or guilt." *Id.* at 427. Careful trial procedures will check "persecution . . . [b]y an intemperate or designing majority in the House of Representatives." *Id.* at 430. The Senate must try impeachments by "cool and candid investigation." 3 Farrand 144, 148 (J. McHenry, addressing Maryland House of Delegates, Nov. 29, 1787).

In the absence of any evidence that the Framers contemplated the use of committees of senators to try impeachments, or intended to grant the Senate unlimited flexibility to do so, Rule XI fundamentally disrupts the checks and balances inherent in the impeachment clause. By drastically reducing the number of senatorial "jurors" to a fraction of what was intended and thus disposing of impeachments more quickly, with less

understanding, Rule XI significantly tilts to the legislature the balance of powers.[29]

C. Early Senate Practice

As this Court stated in *Powell*, the "precedential value of [Congressional practices] tends to increase in proportion to their proximity to the Convention in 1787." 395 U.S. at 547. *Powell* noted approvingly that "what evidence we have of Congress' early understanding confirms our conclusion." *Id.* at 547.

Senate practice for a century and a half following ratification confirms that impeachment trials must be conducted before the entire Senate. In the first three cases, seven former delegates to the Philadelphia Convention participated as senator/jurors,

[29] This analysis cannot be contravened by the House of Lords' supposed "long history of using committees to hear witnesses . . . in impeachment trials," which, it is supposed further, "was well known to the Framers." *See* Opposition to Petition for Writ of Certiorari, at 16 & n.18; Pet. App. A, at 48a-50a, 53a-54a (Edwards, J.). Only a handful of proceedings in the House of Lords in the early 1620s show any evidence that committees were used, and those committees were chiefly used to investigate allegations and draw up charges, not to try the accused. *See, e.g.*, E. Foster, *The House of Lords* 153-61 (1983); C. Tite, *Impeachment and Parliamentary Judicature in Early Stuart England* 172 (1974). In Sir Francis Bacon's case in 1621, after witnesses were examined "in the House itself," E. Foster, *supra*, at 155, the accused confessed, which "obviated the need for the Lords to use the committee's evidence." Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U. L. Rev. 512, 529 (1975). In the trial of Lionel Cranfield, cited by respondents below, a five-day trial took place before the Lords, with the accused "often calling witnesses in his own defense." Tite, *supra*, at 165.

In other impeachments during this period, and in all impeachments after 1626, the Lords made no use of committees. *See* E. Foster, *supra*, at 156-57, 167-72 (1983) (Bennet in 1621 and Strafford in 1640); Tite, *supra*, at 226-27 (Field in 1621 and Bristol in 1626); J. Hatsell, *Precedents of Proceedings in the House of Commons* (1818) (no mention of committees in six impeachment trials between 1700 and 1780). Nor is there any evidence that the Framers were aware of the ancient and infrequent use of committees by the Lords.

counsel for the respondent, or the accused.[30] Each trial was deliberately modelled on criminal trials, permitting all senators to see and hear the witnesses. *See supra* pp. 8-10. Not only the entire Senate sat for each of the early impeachment trials, but the House of Representatives sometimes attended. *See supra* p. 9. In later trials, senators who missed testimony often asked to be excused from voting on the impeachment articles because they could not serve as proper jurors. *See supra* p.11 & n. 8.[31] No one suggested for more than 100 years that review of a written record could be an adequate substitute for a Senate trial.

Before this century, the sole American mention of a committee in impeachment trials is a passing reference in Jefferson's Manual of Parliamentary Practice: "a committee may be named, who shall examine them in committee." Jefferson's Manual of Parliamentary Practice, *reprinted* in H.R. Doc. No. 256, 101st Cong., 2nd Sess. 109, 306 (1985). Jefferson's manual, however, only offered "a sketch of some of the principles and practices of England," and did not purport to comment on the meaning of trial by "the Senate" in the Constitution. *Id.* at 298. Nor can his Manual be read as evidence of original intent: Jefferson did not

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[30] At the Blount proceeding, Jared Ingersoll was defense counsel and John Langdon of New Hampshire served in the Senate. Sen. Blount himself had been a Convention delegate from North Carolina. The Pickering impeachment was tried before Senators Abraham Baldwin of Georgia, Jonathan Dayton of New Jersey, and Pierce Butler of South Carolina. Three Framers (defense counsel Luther Martin and Senators Dayton and Baldwin) participated in the Chase trial.

[31] *Louderback Proceedings*, at 771 (Sen. Copeland) ("I have heard none of the testimony and feel myself incompetent either to vote or to continue as a member of the court"); *id.* at 823 (Sen. Glass) ("other public duties have made it impossible for me to be present and hear more than fragments of the testimony . . . . I feel that, under my oath, I am not so advised as to be able to render a verdict as a juror").

attend the Constitutional Convention, and his Manual was written a decade later.[32]

D. A Fair Impeachment Trial Is Impossible When Seven-Eighths Of The Senators Do Not Hear The Evidence

As demonstrated by the voting patterns in the Claiborne, Hastings, and Nixon impeachments, a Rule XI proceeding is inherently unfair to the accused. The committee members, the only true "jurors" in those proceedings, proved far more receptive to the arguments of the accused than were their uninformed colleagues. *See supra* pp. 14-15; Pet. Br. App. B; Pet. Br. App. C. This bias of the uninformed destroys the Framers' careful separation of powers, rendering the judiciary more vulnerable to a legislative power that the Framers meant to check. The reasons for this biased outcome are plain, and demonstrate the Framers' wisdom in choosing a judicial "trial" by the entire Senate.

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[32] Moreover, Jefferson's views on impeachment matters are not presumptively authoritative. In 1798, Jefferson endorsed Sen. Tazewell's dubious theory, rejected by the Senate, that lay juries should hear impeachment trials. *Jeffersonian Cyclopedia* § 3860-61 (J. Foley ed. 1900) (quoting Letter to Sen. Henry Tazewell (1798)); *see supra* p. 9. Unlike the Framers, Jefferson was no great supporter of judicial independence, as he "questioned the degree to which the Constitution insulates the judiciary," *Chadha*, 462 U.S. at 961 n.3 (Powell, J., concurring), and "predicted that the people 'will see then and amend the error in our Constitution, which makes any branch independent of the nation.'" *Id.* (quoting letter from Jefferson to William Giles during Jefferson's second term as President).

Jefferson is often considered the moving force behind the Chase and Pickering impeachments, which were designed to begin a wholesale purge of Federalist judges from the federal courts and thereby reverse *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See* II G. Haskins & H. Johnson, *History of the Supreme Court of the United States, Foundations of Power: John Marshall, 1801-1815* at 205-11 (1981); Burton, *supra*, 39 A.B.A.J. at 1068-69. Jefferson lamented Chase's acquittal, calling impeachment "a farce which will not be tried again." *Jeffersonian Cyclopedia*, *supra*, § 3854.

Credibility issues, which lay at the heart of the perjury case against Nixon, cannot responsibly be decided by a jury that neither sees nor hears the witnesses. Several senators have protested the Senate's failure in Rule XI proceedings, "as a finder of fact," to hear and see witnesses. *See supra* pp. 13-14 & n. 13. Sen. Heflin noted the inadequacy of the Rule XI procedure after the Claiborne trial (Heflin, *The Impeachment Process, supra*, at 124):

> The other 88 members of the Senate did not have the advantage of hearing the testimony and arguments by counsel. The transcript of the hearing on Judge Claiborne's impeachment totaled over 3,500 pages. Therefore, it is highly improbable that any Senator had the time to thoroughly review this material. Few Senators other than the 12 members of the Impeachment Committee were familiar with all the elements of the case.[33]

Nor is a committee summary of the evidence an adequate substitute for hearing the witnesses. Any summary is necessarily the product of editorial judgments. In this case, the committee report acknowledged its limitations, stating that the committee heard "dramatically inconsistent testimony" and concluding that "[f]amiliarity with these witnesses' various, and divergent, testimony" was "critical." Imp. Rec., Comm. Report at 18-19.

More important, no report can provide the demeanor evidence essential to evaluating conflicting testimony. As James Wilson remarked, jurors "hear everything that is alleged; they not only hear the words, but they see and mark the features of the countenance; they can judge the weight due to such testimony." II M. Jensen, *supra*, at 573; *accord, e.g., Universal*

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[33] Following the Nixon impeachment, Sen. Heflin stated that the competing demands on senators who are not on the trial committee "preclude them from thoughtfully considering the evidence presented at an impeachment trial." Heflin, *Impeaching Federal Judges, supra*, at 34.

Camera Corp. v. National Labor Relations Bd., 340 U.S. 474, 495-96 (1951); *United States v. Nelson*, 476 F.2d 254, 256 (9th Cir. 1973); *NLRB v. Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952) (Frank, J.). One must see and hear the witnesses in order to evaluate credibility.

In this case, only the twelve members of the Rule XI Committee saw and heard Nixon's accusers. Only the committee members watched Wiley Fairchild stumble through a series of failed and conflicting recollections of events long past. When Bud Holmes was asked which of several conflicting versions of his testimony was the truth, only a few senators saw him shrug, "You can use any one you want." Imp. Rec., Pt. 2 at 144. Surely, when the Framers envisioned the Senate "sitting" "on oath" to "try" impeachments, they did not imagine that such pivotal moments would be reported to the Senate in a cold transcript, or "summarized" in a committee report. As the District Court found, the Rule XI procedure "plainly diminished the Senate's ability to appraise conflicting testimony." Pet. App. B, at 67a.

Unfortunately, the Committee Report compounded its inherent limitations by erroneously omitting key passages of Nixon's criminal trial testimony and inaccurately claiming that Nixon's testimony before the Committee "contrast[ed]" with his trial testimony. Imp. Rec., Comm. Report at 74. These errors would not have occurred had Nixon's impeachment trial been conducted before the Senate.

The parallel drawn by the Framers (and the early Senate) between the Senate's role in impeachments and that of a trial court was not accidental. The Framers understood that each senator, having taken an oath, would try the case by listening to the testimony and observing the witnesses' demeanor. Yet under Rule XI, the Senate functions not as a trial court, but as an appellate tribunal, receiving a written record of evidence supplemented with oral argument. Unlike an appellate court,

however, the Senate's constitutional duty is to try the case, not to review a trial record.

A final source of bias under Rule XI is the political character of impeachments, which the Framers fully recognized. There is no political advantage in siding with high officials accused by "the people" of "high crimes and misdemeanors." But Rule XI encourages a verdict based on political considerations, not facts. The accused has a fair chance of persuading those members of the Rule XI committee who hear the evidence. But the other eighty-eight senators, who vote in relative ignorance, are necessarily more susceptible to political exigencies. Not surprisingly, the accused has been convicted in all three Rule XI proceedings (even Alcee Hastings, who had been acquitted in court on identical charges). By contrast, the earlier trials conducted before the full Senate resulted in only four convictions, two of which were essentially uncontested.

Rule XI's bias against the accused is greatest in cases, like Nixon's, involving a prior jury conviction. Rule XI virtually ensures that senators who do not see or hear the witnesses will defer to the jury verdict. As Sen. Levin stated after the Nixon proceeding (Imp. Rec., Proceedings at 444-45):

> Would we be here but for Judge Nixon's conviction? I doubt it, since there is a reasonably supportable, benign explanation of his testimony before the grand jury. . . . I believe it is particularly appropriate for us to use that doctrine [collateral estoppel] in the matter of Judge Nixon, because of the Senate's refusal to allow him to conduct any impeachment trial before the full Senate. Because most of us were not members of the Senate committee that heard the evidence in this matter and were not present to evaluate the demeanor of the witnesses, we are at a disadvantage in making the factual findings required by this proceeding.

See also id. at 448 (Sen. Grassley) ("Judge Nixon is asking the Senate to overturn the verdict of the jury.").

The Framers would have been appalled by the proposition that Nixon's jury conviction was entitled to conclusive deference because eighty-eight senators did not know the facts of the case. That proposition utterly defeats the Framers' intent that there be a deliberate impeachment trial. Rule XI effectively guarantees that the eighty-eight uninformed senators will view the impeachment process as a plea "to overturn the verdict of the jury," not as a real trial in which the prosecution bears the burden of proof.

That the Senate must be able to evaluate evidence fairly and fully, without relying on any prior proceeding, was stressed by Jared Ingersoll, a delegate to the Constitutional Convention, when he addressed the Senate on behalf of Sen. Blount in 1798. Ingersoll successfully argued that the Senate was not a proper body to hear further charges against Blount, since it already had expelled him: "Do the Senate come, as Lord Mansfield says a Jury ought, like blank paper . . . . Would not error in the first sentence naturally be productive of error in the second instance?" *Blount Proceedings*, at 74.

Similarly, Hamilton, in *The Federalist* No. 65, emphasized the need for a trial body other than the courts when the alleged impeachable offense might also be prosecuted in the courts (*The Federalist* No. 65, at 428): "Would there not be the greatest reason to apprehend, that error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision?" Only a Senate trial provided "the double security intended . . . by a double trial." Rule XI eliminates that double security.

E. Trial By Committee Cannot Be Justified By Appeals To Expediency

The principal rationale for Rule XI is that the Senate has no time for impeachment trials. The press of legislative business, the argument goes, makes trial on the Senate floor a luxury of bygone days, particularly in light of the increased size of the Senate and the supposedly increasing "pace of impeachments." Pet. App. A, at 51a n.18.

This contention rests on distorted facts. First, there have been only thirteen federal impeachment trials in history; in this century, there have been seven, or an average of one every thirteen years. The Claiborne trial took seven trial days, Hastings eighteen, and Nixon four, for an average length of ten days. A task of this constitutional importance that requires ten days every thirteen years — less than one day a year — cannot be considered an unreasonable burden, particularly in light of prior Senate's attention to lengthy impeachment trials at the height of the Civil War, and through most of Franklin Roosevelt's "100 Days." *See supra* p. 12 & n. 4.

Moreover, the Senate is not significantly larger now than it was when it conducted impeachment trials itself. Over ninety Senators sat for the Archbald, Louderback and Ritter trials; ninety for Swayne; seventy-six for Belknap; and fifty-four for President Johnson.

But even if there were a greater burden on the Senate today than at the beginning of our constitutional history, that increased burden, by itself, could not justify ignoring a clear constitutional requirement. As the Supreme Court held in *Chadha*, 462 U.S. at 944:

> [T]hat a given law or procedure is efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are

not the primary objectives — or the hallmarks — of democratic government. . . .

A second rationale offered for Rule XI is "fairness" to the accused. Since most senators will ignore a trial on the Senate floor, the argument goes, the quality of the deliberations would be even worse if the trial were conducted before all 100 senators. *See* Pet. App. A, at 54a-57a; *Hastings*, 716 F. Supp. at 40. This argument is entirely without force. The Framers surely understood that the quorum clause in Article I, section 5, clause 1, would govern attendance at official Senate proceedings, and considered that standard satisfactory. In any event, the "fairness" rationale's assumption of senatorial negligence is entirely unwarranted in light of the Senate's history of diligent attention to impeachment trials.

Moreover, this rationale would permit one branch of the government to eliminate constitutional responsibilities simply by defaulting on them. Could the judiciary eliminate the burdens of providing jury trials in private civil cases by declaring that jurors are ignorant louts who do not pay attention and too often follow their prejudices? *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 458 (1977). This Court can hardly decide this constitutional question by assuming congressional irresponsibility.

Perhaps the most disturbing feature of the expediency and "fairness" arguments is their utter lack of limits. Once Rule XI is permitted to sever the trial of impeachments from the constitutional text, there is no stopping point. In the District Court, the Senate admitted its ultimate goal of dispensing with impeachment hearings completely: "There is no support in the text, history, or purpose of the impeachment trial power to preclude the Senate from determining to try an impeachment based upon a written evidentiary record created through full and fair adversary proceedings." Memorandum of the United States Senate As Amicus Curiae in support of Judgment for Defendants

(March 20, 1990) at 54. If left up to the Senate, impeachment "trials" might someday consist merely of receiving the record of a criminal case, or of a disciplinary proceeding, or of House impeachment hearings.

That view of the impeachment clause is antithetical to the Framers' conclusion that a Senate trial is essential to the balance of powers, and announces a message fundamentally at odds with the constitutional scheme: impeachment becomes a routine matter, relegated to a committee so that the "real" business of the Senate is not disrupted. That view degrades the separation of powers, and denigrates the independence of the judiciary. This Court cannot uphold the transformation of impeachment, through Rule XI, from a grave confrontation of the branches of government into a bureaucratized bit of legislative business to be completed with the least possible effort.

II. THIS CASE IS JUSTICIABLE

Under our system of checks and balances, "[i]t is emphatically the province and duty of the judicial department to say what the law is" according to the provisions of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The impeachment clause is no exception: if Impeachment Rule XI contravenes Article I, section 3, clause 6, by substituting a committee hearing for a trial by the Senate, this Court must so declare, even though it means overturning "congressional consideration of [a] constitutional question." *United States v. Munoz-Flores*, 495 U.S. 385, 110 S. Ct. 1964, 1968-69 (1990).

The Court of Appeals declined to rule on Nixon's constitutional claim on the ground that it is nonjusticiable. Judge Williams' opinion for the Court characterized the issue of the Senate's compliance with the impeachment clause as a "political question." Judge Randolph's concurring opinion disclaimed reliance on the political question doctrine, but agreed that this

case is nonjusticiable under the doctrine of separation of powers. Both are wrong.

The judicial power to determine the constitutionality of Rule XI can no more be shared with or conferred exclusively on the Senate than "Congress [can] share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *United States v. Nixon*, 418 U.S. 683, 704 (1974).

A. The Constitution Does Not Grant The Senate Unreviewable Power To Conduct Impeachment Trials

1. The Word "Sole" In Article I, § 3, cl. 6 Does Not Preclude Judicial Review

The argument that this case is nonjusticiable turns largely on a single word: the Senate's "sole" power to try impeachments. Pet. App. A, at 4a, 16a. Respondents rely on the opinion in *Ritter v. United States*, 84 Ct. Cl. 293, 296 (1936), *cert. denied*, 300 U.S. 668 (1937):

> [W]hen the provision that the Senate should have "the *sole* power to try all impeachments" was inserted in the Constitution, the word "sole" was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment.

For Judge Williams, the term "sole" constitutes a "textually demonstrable commitment" to the Senate of the issue presented here, barring the courts from reviewing this case under the political question doctrine as formulated in *Baker v. Carr*, 369 U.S. 186, 217 (1962). Pet. App. A, at 4a, 13a. For Judge Randolph, the term "sole" prohibits review for separation of powers reasons, whether or not the case is strictly a "political

question." *Id.* at 16a. But the word "sole" cannot carry the immense significance so conferred on it.

First, the term was a cosmetic edit inserted by the Committee of Style at the tail end of the Convention, after the delegates had approved the substance of the impeachment trial clause. *See supra* p. 6. As this Court has stated in response to similar contentions (*Powell*, 395 U.S. at 538-39):

> [R]espondents' argument misrepresents the function of the Committee of Style. It was appointed only "to revise the stile of and arrange the articles which had been agreed to . . . ." 2 Farrand 553. "[T]he Committee . . . had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so . . . ." [quoting C. Warren, *The Making of the Constitution* 422 n.1 (1928)].

The meaning of Article I, section 3, clause 6 was thus entirely established before the Committee of Style inserted the word "sole."

With "sole" stripped of substantive significance, the text must be interpreted as the Framers intended: "The Senate of the United States shall have power to try all Impeachments." 2 Farrand 552, 572. The claim that this case is nonjusticiable then cannot be squared with *Powell v. McCormack* or other decisions of this Court.

Even if the Committee of Style's insertion of "sole" were given some weight, this case still would be fully justiciable. The ordinary understanding of "sole" in the impeachment trial clause is that the Senate — not the courts, not a lay jury, not a Senate Committee — shall try impeachments. After all, the Convention grappled for many weeks with the question of which entity should hear the impeachment trial. *See supra* pp. 3-6. Thus, the word "sole" flatly prohibits the Senate from doing what Rule XI

does: delegate the impeachment trial to an entity other than the Senate.

That "sole" has no impact on justiciability is powerfully supported by Article II, section 2, clause 1, which states that the president may grant pardons "except in cases of Impeachment." That limitation on the president's pardon power would not have been necessary if the Framers thought the impeachment trial clause already gave the Senate such total power that no other branch could address the issue. Indeed, the Framers specifically excluded impeached officers from the pardon power, but imposed no such impeachment exclusion on judicial review. The failure to exclude judicial review of constitutional challenges to impeachment procedures, in contrast with the express exclusion to impeachment pardons, further supports judicial review here.

2. Interpreting Constitutional Limits Is The Business Of The Courts

In *Powell*, the plaintiff claimed that the House of Representatives wrongly refused to seat him even though he met the qualifications for a congressman in Article I, section 2. The defendants contended that the claim presented a nonjusticiable political question. Relying on Article I, section 5, which gives the House the power to "Judge . . . [the] Qualifications of its own Members," the defendants argued that "the House, and the House alone, has power to determine who is qualified to be a member." 395 U.S. at 519. The provision granting the House the power to judge members' qualifications, the defendants contended, was a "textually demonstrable commitment" of the issue to the House, and barred the courts from review under *Baker v. Carr*.

This Court rejected that defense, observing that "Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution." 395 U.S. at 548. What qualifications applied to Powell, the Court ruled, is a question that courts can decide.

After reviewing the constitutional history of the "qualifications" clause and congressional practice under it, the Court held that Congress could apply only the standing membership requirements set forth in Article I, section 5.

Under *Powell*, even when the Constitution assigns a power to a coordinate political branch this Court still must judge whether that branch has complied with the textual limitations on its power. "The plenary authority of Congress . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." *Chadha*, 462 U.S. at 940-41; *see also Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 614 (1929) (Senate may judge members' elections, "subject only to the restraints imposed by or found in the implications of the Constitution"); *Missouri Pacific Ry. v. Kansas*, 248 U.S. 276 (1919) (two-thirds majority for veto override means two-thirds of quorum); *National Prohibition Cases*, 253 U.S. 350 (1920) (same); *United States v. Ballin*, 144 U.S. 1, 5-6 (1891) (House may determine presence of quorum by method "reasonably certain of ascertaining [that] fact" but may not evade quorum requirement).[34]

Although asserting that the Senate has "unreviewable" power to conduct impeachment trials, respondents concede that,

---

[34] The justiciability of this case is reinforced by the conclusion of several state courts that, under state constitutional provisions modelled after the federal impeachment provisions, courts retain the power to ensure that impeachment powers are exercised in accordance with the state constitution. *See, e.g., Mecham v. Gordon*, 751 P.2d 957, 962 (Ariz. 1988) ("This Court does have power to ensure that the legislature follows the constitutional rules on impeachment."); *Kinsella v. Jaekle*, 475 A.2d 243, 253 (Conn. 1984) (courts may review impeachment issues "where legislature "is acting clearly outside the confines of its constitutional jurisdiction to impeach"); *In re Investigation by Dauphin Co. Grand Jury*, 2 A.2d 802, 803 (Pa. 1938) ("courts have no jurisdiction in impeachment proceedings . . . so long as actions taken are within constitutional lines").

under *Powell*, "judicial review might be available if the Senate were to exceed express textual limitations on its substantive impeachment powers: for example, if the Senate tried petitioner without prior House impeachment, Art. I, § 2, Cl. 5, or purported to impose a sanction more severe than removal or disqualification, Art. I, §3, Cl. 7." Opposition to Petition for Writ of Certiorari, at 9, 13. Respondents contend that Rule XI does not violate any "express textual limitations on its substantive impeachment powers." *Id.* at 13.

But Nixon's claim is that a Rule XI hearing does not satisfy the constitutional requirement that the Senate try all impeachments; respondents simply disagree with that claim on the merits. This dispute is no different in character from that presented in *United States Dep't of Commerce v. Montana*, 60 U.S.L.W. 4279 (U.S. March 31, 1992), a challenge to Congress' method of apportioning congressional seats among the states.

In addressing the government's political question argument in *Montana*, Justice Stevens stressed that "the Government does not suggest that all congressional decisions relating to apportionment are beyond judicial review." *Id.* at 4283. Because both parties there, as here, agreed "that the Constitution places substantial limitations on Congress's apportionment power and that violations of those limitations would present a justiciable controversy," *id.* at 4284, the issue in dispute was not "the existence of a judicially enforceable right," but "the definition of such a right." *Id.* When a case "turns on the proper interpretation of the relevant constitutional provisions," the Court stressed, the political question doctrine "presents no bar to our reaching the merits." *Id.*

As in *Powell*, *Montana*, *Chadha*, and *Missouri Pacific*, this case "turns on the proper interpretation of the relevant constitutional provision[]," Article I, section 3, clause 6. Such interpretation is the ordinary business of this Court.

Nor is judicial review precluded by the rulemaking clause of the Constitution, Article I, section 5, clause 2 ("Each House may determine the Rules of its Proceedings"). *See* Opposition to Petition for Writ of Certiorari at 9; Pet. App. A, at 9a-10a. Congress has the power to determine its own rules of procedure, but it "may not by its rules ignore constitutional restraints or violate fundamental rights." *United States v. Ballin*, 144 U.S. 1, 5 (1891).[35] This Court's review of whether the Senate has complied with the constitutional requirement for impeachment trials cannot be barred by the rulemaking clause, any more than that clause would bar review of the Senate's compliance with the two-thirds majority requirement or with the other limitations imposed on the impeachment power.

B. The Separation Of Powers Does Not Preclude Judicial Review, But Rather Requires It

That resolution of this case may impinge on the exercise of a core constitutional function by a coordinate branch does not render the matter nonjusticiable. "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell*, 395 U.S. at 549. Although the courts will avoid "inappropriate interference in the business of the other branches of government," *Munoz-Flores*,

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[35] *Accord, e.g., Groppi v. Leslie*, 404 U.S. 496 (1972) (Due Process Clause applies to Congress's power to punish contempts); *Yellin v. United States*, 374 U.S. 109 (1963) (Court will review House committee procedures); *see also Morgan v. United States*, 801 F.2d 445, 450 (D.C. Cir. 1986) ("Authorization to determine rules of proceedings does not inevitably exclude review of the lawfulness of those rules."), *cert. denied*, 480 U.S. 911 (1987).

495 U.S. 385, 110 S. Ct. at 1964, the "[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications." *Chadha*, 462 U.S. at 943 (citations omitted).[36] Otherwise, "*every* judicial resolution of a constitutional challenge to a congressional [action] . . . would be impermissible." *Munoz-Flores*, 495 U.S. 385, 110 S. Ct. at 1968 (emphasis in original).

The paramount importance of maintaining the "carefully crafted system of checked and balanced power," *Mistretta*, 488 U.S. at 381, overrides any concern that judicial review diminishes either of the political branches. Thus, in deciding many difficult cases defining the constitutional limits of a coordinate branch's power, this Court has rejected arguments that the case was nonjusticiable. *See, e.g., Powell v. McCormack*, 395 U.S. 486 (1969); *United States v. Nixon*, 418 U.S. 683 (1974); *INS v. Chadha*, 462 U.S. 919 (1983); *United States v. Munoz-Flores*, 495 U.S. 385, 110 S. Ct. 1964 (1990); *United States Dep't of Commerce v. Montana*, 60 U.S.L.W. 4279 (U.S. March 31, 1992). In other, equally significant cases, the Court has properly assumed justiciability. *See, e.g., Missouri Pacific Ry. v. Kansas*, 248 U.S. 276 (1919); *National Prohibition Cases*, 253 U.S. 350 (1920); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Morrison v. Olson*, 487 U.S. 654 (1988); *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647 (1989).

Here, although the Senate has the exclusive power to try impeachments, it may not exercise that power in violation of the Constitution. The Senate's power to try impeachments is no greater or more immune from judicial review than Congress'

[36] *Accord, e.g., Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982); *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring in the judgment); *Baker v. Carr*, 369 U.S. at 217.

exclusive power to legislate, or its exclusive power to judge its members' qualifications at issue in *Powell*. All such powers are subject to judicial review to enforce constitutional limits.

Judge Williams contended that the intent of the Framers in placing the trial of impeachments in the Senate is inconsistent with judicial review of Nixon's claim, because "the judges themselves would sit in final judgment over this check on their excesses." Pet. App. A, at 6a. But to confer on the Senate the unreviewable power, not only to conduct impeachment trials, but to construe the constitutional provisions that govern that power, is to embrace "the particular danger of the Legislative Branch's accreting to itself judicial . . . power" feared by the Framers. *Mistretta*, 488 U.S. 361, 109 S. Ct. at 660. As Hamilton wrote in *The Federalist* No. 78, at 492:

> If it be said that the legislative body are themselves the constitutional judges of their own powers . . . it may be answered, that this cannot be the natural presumption . . . It is far more rational to suppose, that the courts were designed . . . to keep the [legislature] within the limits assigned to their authority.

"Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (citing *The Federalist* No. 47 (Madison)).

That the judiciary's interests may be affected by judicial review of legislative or executive action has never been deemed to preclude judicial review. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647 (1989) (reviewing constitutionality of judicial commission to promulgate sentencing guidelines); *Morrison v. Olson*, 487 U.S. 654 (1988) (reviewing constitutionality of judicial appointment of special prosecutors).

Finally, executive officers, including the President, may be impeached, and Judge Williams' objection would not apply to judicial review in executive impeachment cases. Yet nothing in the impeachment clause or any other part of the Constitution suggests that judicial review should be available for violations of the impeachment clause only in executive impeachments. To the contrary, Article III, section 2, clause 1 provides that "[t]he judicial Power shall extend to *all* Cases, in Law and Equity, arising under this Constitution." (Emphasis added.)

Judge Randolph's suggestion that review of Nixon's claim would open the "floodgates" of impeachment litigation, and Judge Williams' desire to ensure "finality," are similarly without force. *See* Pet. App. A, at 13a, 16a-17a. A court decision applying the impeachment clause need not lead to endless litigation any more than *Powell* has submerged the courts in disputes over congressional qualifications. If a constitutional limitation is violated, judicial review must be available. *See Davis v. Bandemer*, 478 U.S. 109, 126-27 (1986).

When one branch violates a clear constitutional limit on its power, the courts may not avert their eyes and say, as did Judge Williams, that the nation's only recourse is at the ballot box. Pet. App. A, at 15a. Neither may courts throw up their hands when confronted with the possibility of extreme constitutional transgressions, mourning that in those circumstances "the republic will have sunk to such depths [that] no court could rescue it." *Id.* at 14a-15a. That response is an abandonment of the principle of judicial review, and with it the courts' responsibility under the Constitution.

By abdicating its responsibility to "try" impeachments, the Senate overreached its powers in the critical balance between the coordinate branches struck by the impeachment clause. Such a constitutional violation is fully reviewable by the courts. This conclusion protects the core constitutional values that hang in the balance here: by unilaterally changing the impeachment

procedure prescribed by the Constitution, the Senate has arrogated to itself greater power over the executive and the judiciary, to be exercised with less care.

CONCLUSION

For all of the foregoing reasons, the decision below should be reversed and declaratory judgment should be entered in favor of petitioner.

Respectfully submitted,

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APPENDIX A

UNITED STATES CONSTITUTION

Article I, Section 3, Clause 6

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Article I, Section 3, Clause 7

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Article II, Section 2, Clause 1

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Article II, Section 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III, Section 2, Clause 3

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Senate Impeachment Rule XI

[I]n the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

APPENDIX B

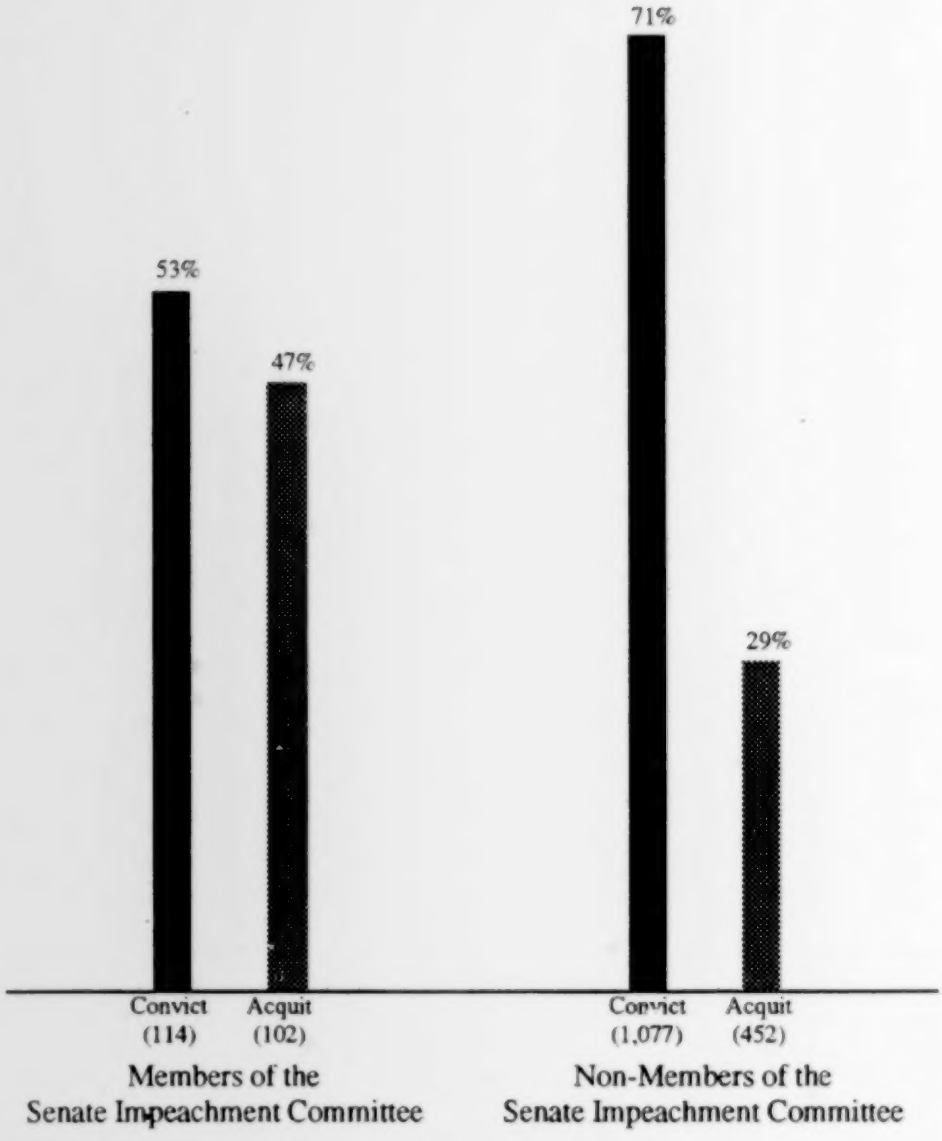
	COMMITTEE MEMBERS VOTE (%) Convict - Acquit	NON-COMMITTEE MEMBERS VOTE (%) Convict - Acquit	TOTAL VOTE Convict - Acquit
Claiborne			
Art. I	9-3 (75%)	78-7 (92%)	87-10
Art. II	9-3 (75%)	81-4 (95%)	90-7
Art. III*	3-9 (25%)	43-43 (50%)	46-52
Art. IV	9-3 (75%)	80-5 (94%)	89-8
Hastings			
Art. I	7-5 (58%)**	62-21 (75%)	69-26
Art. II	7-5 (58%)**	61-22 (73%)	68-27
Art. III	7-5 (58%)**	62-21 (75%)	69-26
Art. IV	6-6 (50%)**	61-22 (73%)	67-28
Art. V	7-5 (58%)**	60-23 (72%)	67-28
Art. VI*	3-9 (25%)	45-38 (54%)	48-47
Art. VII	7-5 (58%)**	62-21 (75%)	69-26
Art. VIII	6-6 (50%)**	62-21 (75%)	68-27
Art. IX	7-5 (58%)**	63-20 (76%)	70-25
Art. XVI*	0-12 (0%)	0-83 (0%)	0-95
Art. XVII*	6-6 (50%)	54-29 (65%)	60-35
Nixon			
Art. I	9-3 (75%)	80-5 (94%)	89-8
Art. II	7-5 (58%)**	71-14 (84%)	78-19
Art. III*	5-7 (42%)	52-33 (61%)	57-40

* Acquittal by Senate

** Less than two-thirds of trial committee members voted for conviction.

APPENDIX C

Votes for Conviction in the United States Senate on Articles of Impeachment Presented Against Judges Claiborne, Hastings, and Nixon*



*As reported in the Congressional Record. *See* Jt. App. C, at 12a-33a (Nixon vote); 135 Cong. Rec. S13782-88 (daily ed. Oct. 20, 1989) (Hastings vote); 132 Cong. Rec. 29870-73 (1986) (Claiborne vote).

Supreme Court, U.S.
FILED
JUN 10 1992
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No. 91-740

In the Supreme Court of the United States

OCTOBER TERM, 1991

WALTER L. NIXON, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS AND AMICUS CURIAE UNITED STATES SENATE

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QUESTIONS PRESENTED

1. Whether the Constitution's commitment to the Senate of "the sole Power to try all Impeachments" renders a complaint about the trial procedures employed by the Senate nonjusticiable.

2. Assuming that this case is justiciable, whether the constitutional assignment to the Senate to try all impeachments prevents that body from using a committee to compile an evidentiary record for consideration by the full Senate.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-740

WALTER L. NIXON, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS AND AMICUS CURIAE UNITED STATES SENATE

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-57a, is reported at 938 F.2d 239. The opinion of Judge Edwards denying a petition for rehearing, Pet. App. 84a-85a, is unreported. The opinion of the district court, Pet. App. 58a-69a, is reported at 744 F. Supp. 9.

JURISDICTION

The judgment of the court of appeals was issued on July 9, 1991. A petition for rehearing was denied on August 5, 1991. Pet. App. 83a. The petition for a writ of certiorari was filed on November 4, 1991 (a Monday), and was granted on February 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND SENATE RULE INVOLVED

The Impeachment Trial Clause, U.S. Const. Art. I, § 3, Cl. 6, the Rulemaking Clause, U.S. Const. Art. I, § 5, Cl. 2, and Senate Impeachment Rule XI, S. Doc. No. 1, 101st Cong., 1st Sess. (1989), are reproduced in the appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

Petitioner Walter L. Nixon, Jr., a former United States District Judge for the Southern District of Mississippi, brought this action to challenge his conviction by the United States Senate on two articles of impeachment. Petitioner sued the United States, the Secretary of State, and the Director of the Administrative Office of the United States Courts, seeking an order declaring that the Senate impeachment trial procedures are invalid and that he remains entitled to full pay and benefits as a district judge. See J.A. 4a-11a (Complaint). The United States District Court for the District of Columbia dismissed petitioner's challenge as nonjusticiable. Pet. App. 58a-69a. The court of appeals affirmed. *Id.* at 1a-57a.[1]

A. The Senate's Impeachment Trial Procedures

The Constitution provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and

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[1] The United States Senate participated fully in the proceedings below as *amicus curiae* and appears here also in that capacity pursuant to 2 U.S.C. 288e(a), which provides that the Senate may direct its Legal Counsel to appear as *amicus curiae* in its name "in any court of the United States * * * in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permission to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. 288*l*(a). See S. Res. 237, 101st Cong., 2d Sess. (1990); 136 Cong. Rec. S587-S588 (daily ed. Jan. 30, 1990) (directing appearance in this case).

Misdemeanors." U.S. Const. Art. II, § 4. It further provides that the House of Representatives "shall have the sole Power of Impeachment," U.S. Const. Art. I, § 2, Cl. 5, and that the Senate "shall have the sole Power to try all Impeachments." U.S. Const. Art. I, § 3, Cl. 6. A Senate conviction on articles of impeachment "shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. Const. Art. I, § 3, Cl. 7.

The Constitution does not specify the procedures that the Senate shall follow in trying impeachments, except to impose the following restrictions:

> When sitting for that Purpose, [the Senate] shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two thirds of the Members present.

U.S. Const. Art. I, § 3, Cl. 6. The Constitution does provide, however, that the Senate "may determine the Rules of its Proceedings." U.S. Const. Art. I, § 5, Cl. 2. The Senate has promulgated "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials." See *Senate Manual*, S. Doc. No. 1, 101st Cong., 1st Sess. 183-192 (1989) (Senate Impeachment Rules).[2]

The Senate Impeachment Rules specify, among other things, how evidence may be received. Rule XI states that "the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine." S. Doc. No. 1, *supra*, at 186. Rule XI further provides:

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[2] The present form of the Senate Impeachment Rules can be traced back to 1868, when those Rules were comprehensively revised, based on practices utilized in earlier proceedings, in preparation for the trial of President Andrew Johnson. The rules have been amended from time to time since.

> The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

Id. at 186-187. In this case, the Senate employed those procedures, which it first adopted in 1935 (79 Cong. Rec. 8309-8310) and amended in 1986 (132 Cong. Rec. 21,892-21,894).[3]

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[3] Under Rule XI, appointment of an evidentiary committee is not automatic, but requires an individual judgment by the Senate in each impeachment proceeding. See S. Rep. No. 401, 99th Cong., 2d Sess. 5 (1986). The Senate first determined to appoint a committee to receive evidence in 1986 in the impeachment trial of then-Judge Harry Claiborne. Three years later, during then-Judge Alcee Hastings' impeachment, the Senate studied the Claiborne experience and revisited the constitutional issues relevant to use of an evidentiary committee. See S. Rep. No. 1, 101st Cong., 1st Sess. 5-74 (1989). After concluding in the Hastings matter that use of a committee was constitutional and prudent, see 135 Cong. Rec. 4533-4534 (1989), the Senate was prepared to proceed directly to appointment of an evidentiary committee when, two months later, the House presented impeachment articles against petitioner.

Although the Senate determined to use a committee to receive evidence in all three cases, it did not delegate all responsibility over the matters to the appointed committees. To the contrary, the Senate structured the proceedings so that the full Senate would make the particular decisions appropriate to each case. In the Claiborne proceeding, the full Senate heard argument on and decided several motions, including motions to postpone the proceedings, to declare a standard of proof, and to issue subpoenas for additional witnesses. See 132 Cong. Rec. 29,127-29,136, 29,152-29,153, 29,413 (1986). In the Hastings impeachment, the Senate considered Hastings' motion to dismiss all but one of the impeachment articles on

B. Petitioner's Criminal Conviction

Prior to petitioner's impeachment and removal from office, he was found guilty, after a jury trial in the United States District Court for the Southern District of Mississippi, on two counts of making false statements before a federal grand jury, in violation of 18 U.S.C. 1623. The evidence supporting petitioner's criminal conviction is described in the court of appeals decision affirming the conviction, *United States* v. *Nixon*, 816 F.2d 1022 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988), the district court decision denying petitioner's motion for a new trial, *Nixon* v. *United States*, 703 F. Supp. 538 (S.D. Miss. 1988), and the court of appeals decision affirming that ruling. *United States* v. *Nixon*, 881 F.2d 1305 (5th Cir. 1989). See Pet. App. 2a.

Briefly stated, petitioner lied to a federal grand jury convened to investigate allegations that he had accepted an unlawful gratuity from a Mississippi businessman, Wiley Fairchild. While sitting as a federal judge, petitioner participated with Fairchild in an oil and gas venture in which petitioner "was able to purchase an interest in three oil well properties at an extremely modest price." 816 F.2d at 1024. During the period of the business venture, Wiley's son, Drew, was arrested on drug smuggling charges and indicted by a state grand jury. Petitioner thereafter discussed the state indictment, first with Wiley Fairchild at Fairchild's office, then with the state prosecutor, Bud Holmes, at Holmes' farm, and finally in a telephone conversation, placed from Holmes' farm, to Wiley Fairchild. See *Id.* at 1026-1029. Although petitioner has disputed the precise content of those con-

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legal grounds, before appointing an evidentiary committee. See 135 Cong. Rec. 4221-4235, 4532-4533 (1989). As to petitioner, the full Senate adjudicated two motions he filed, including a motion to dismiss one of the articles. See 135 Cong. Rec. S14,634-S14,635 (daily ed. Nov. 3, 1989). Thus, the Senate assigns to a committee only the limited duty of compiling an evidentiary record to serve as the basis for the Senate's deliberations.

versations, he does not dispute that he had three conversations relating to Drew's indictment. *Ibid.*[4]

When federal investigators inquired about petitioner's involvement in the Drew Fairchild matter, petitioner did not reveal his three conversations. When petitioner was asked under oath before the federal grand jury whether Bud Holmes had ever discussed the Drew Fairchild case with petitioner, petitioner replied:

> No, not to the best of my recollection. I think I would recall if he had.

816 F.2d at 1025. He later volunteered under oath:

> I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case in federal court. * * * I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, [that] in any way influence[d] anybody with respect to this case.

Ibid. (corrections to transcript in brackets). On the basis of those denials, petitioner was convicted on two counts of making false statements to the grand jury and sentenced to prison. He was acquitted on a third false statement count and on one count of receipt of an unlawful gratuity. Pet. App. 2a. See also 87-650 Br. in Opp. in *Nixon* v. *United States*, cert. denied, 484 U.S. 1026 (1988).

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[4] According to petitioner, in the first conversation, Wiley Fairchild contended that Holmes had brought the indictment to blackmail Fairchild, and Fairchild "wanted me to mention something about that to Bud Holmes." 816 F.2d at 1026, 1027. Petitioner admits that he then visited Bud Holmes and raised Fairchild's concerns. *Id.* at 1027. Petitioner also admits that after speaking with Holmes, he spoke to Fairchild by phone about the conversation with Holmes. *Id.* at 1028. Fairchild, Holmes, and a third witness, Carroll Ingram, testified that petitioner played a more significant role than petitioner has acknowledged in advocating Fairchild's interests. *Id.* at 1026-1029.

C. Petitioner's Impeachment Trial

Petitioner was impeached and removed from office for the same conduct—perjurious testimony to a federal grand jury—that supported his criminal conviction. Following petitioner's criminal conviction, the Judicial Conference certified to the House of Representatives that impeachment might be warranted. The House investigated the matter, and one of its subcommittees heard seven days of testimony from nine witnesses, including petitioner. See H.R. Rep. No. 36, 101st Cong., 1st Sess. 14-15 (1989). On May 10, 1989, the House impeached petitioner on three articles for high crimes and misdemeanors. See 135 Cong. Rec. H1811 (daily ed. May 10, 1989). Articles I and II charged petitioner with giving false testimony before the grand jury, conduct for which he had been criminally convicted. Article III charged petitioner with bringing disrepute on the federal Judiciary by making numerous false statements to the grand jury and federal investigators. See App., *infra*, 3a-7a.

When the Members of the Senate received the articles of impeachment, they took the constitutionally prescribed oath, Art. I, § 3, Cl. 6—swearing to "do impartial justice according to the Constitution and laws," S. Doc. No. 1, *supra*, at 190—and agreed to Senate Resolution 128, providing for appointment of a twelve-member Impeachment Trial Committee in accordance with Senate Impeachment Rule XI. S. Res. 128, 101st Cong., 1st Sess. (1989) (App., *infra*, 8a-9a). The Resolution directed the Committee, in accordance with Rule XI, to compile and report to the full Senate an evidentiary record concerning the House charges. The Resolution also authorized the Committee "to report to the Senate a statement of facts that are not contested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact." 135 Cong. Rec. S5199 (daily ed. May 11, 1989). See App., *infra*, 8a-9a.[5]

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[5] In June 1989, before the Committee began taking evidence, petitioner intervened in a pending civil action filed by then-Judge Alcee

The Senate Committee heard testimony over four days from ten witnesses, including petitioner.[6] Petitioner's counsel thoroughly cross-examined the witnesses called by the House impeachment managers, but chose to call no witnesses other than petitioner and certain character witnesses. In October 1989, the Committee reported to the Senate a record of its proceedings, *Hearings Before the Senate Impeachment Trial Comm.: Report of the Senate Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr. (S. Hrg. 247)*, 101st Cong., 1st Sess. Pts. 1-4 (1989), and the requested statement of uncontested facts and summary of evidence on contested factual issues, *Report of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.*, S. Rep. No. 164, 101st Cong., 1st Sess. (1989). In accordance with the Senate's instructions, the Committee report made no proposed findings on contested issues of fact and made no recommendations regarding disposition of

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Hastings in the United States District Court for the District of Columbia, to attack his own impeachment proceedings. Petitioner contended that the appointment of the Committee under Rule XI violated the constitutional provision that the Senate try all impeachments. The district court denied petitioner's motion for a preliminary injunction and dismissed both judges' complaints. *Hastings* v. *United States Senate*, 716 F. Supp. 38 (D.D.C. 1989) (*reprinted at* Pet. App. 70a-78a). The district court held that petitioner's claim was nonjusticiable, stating that "[i]t is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution" and that the relief petitioner sought was "utterly foreign to our system of divided powers." 716 F. Supp. at 40, 41. The court of appeals affirmed the dismissal of the complaints on lack of ripeness grounds, without reaching the justiciability issue. See 887 F.2d 332 (D.C. Cir. 1989) (Table); No. 89-5191 (D.C. Cir. Oct. 18, 1989), slip op. 2 (*reprinted at* Pet. App. 79a-82a).

[6] Both parties had the opportunity to summon witnesses for examination, to cross-examine adverse witnesses, and to introduce documentary evidence. Members of the Committee also questioned witnesses. The Committee's proceedings were broadcast live to all Senate offices and were videotaped to enable Senators to observe the proceedings at their convenience. Pet. App. 21a.

the impeachment articles. See generally S. Rep. No. 164, *supra*; Pet. App. 20a.[7]

Both petitioner and the House impeachment managers filed extensive briefs on issues of fact and law, which were distributed to all Senators. On November 1, 1989, the full Senate set aside three hours for both sides to present arguments. Petitioner divided his time with his attorney and personally addressed the full Senate for approximately 30 minutes. 135 Cong. Rec. S14,502-S14,504 (daily ed.). His counsel was given as much additional time as he desired to present his points, *id.* at S14,511, and petitioner declined a similar offer to extend his own presentation. *Id.* at S14,504. In his written brief, petitioner noted his contention that the receipt of evidence by a committee under Rule XI is unconstitutional. But at no point during the afternoon of argument did petitioner or his counsel attempt to persuade the Senate to exercise its discretion to send for any particular witnesses to testify before the full Senate. At the end of the arguments, a number of Senators posed questions to the parties or their counsel, and petitioner personally answered several of them. *Id.* at S14,513-S14,516. See Pet. App. 22a.

The Senate deliberated for six hours in closed session on the impeachment articles. See 135 Cong. Rec. S14,561 (daily ed. Nov. 2, 1989). On November 3, 1989, the Senate voted by the necessary two-thirds majority to convict petitioner on two of the three articles of impeachment. The Senate first denied, by a vote of 90 to 7, petitioner's motion for what he described as "a full trial before the full Senate." *Id.* at S14,634 (daily ed.). It then convicted petitioner on impeachment Article I by a vote of 89 to 8 and on Article II by a vote of 78 to 19. On Article III, petitioner was acquitted because only 57 Sen-

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[7] The Committee's hearing record, which was composed of nine volumes, included the Committee's proceedings as well as the records of petitioner's criminal proceedings and House impeachment proceedings.

ators voted to convict—less than the two-thirds majority required for conviction. *Id.* at S14,635-S14,636. See Pet. App. 22a.

D. Judicial Proceedings Below

Petitioner subsequently filed this action, alleging that the Senate's use of the Rule XI procedures violates the constitutional provision that the Senate "try" all impeachments. The district court granted respondents' motion to dismiss the complaint as nonjusticiable, concluding that petitioner "has not established the kind of clear violation of a specific constitutional requirement which would trigger judicial authority to review a solemn and serious Senate action." Pet. App. 66a. The court observed that the "opportunity to present and cross-examine witnesses before the Committee and the opportunity to argue both personally and by counsel before the full Senate" undermined petitioner's claim of a justiciable "departure from the Constitution's textual commitment to the Senate of the 'sole Power to try all Impeachments.'" *Id.* at 68a.

The court of appeals affirmed. In the opinion for the court, Judge Williams concluded that the text of the Constitution, which gives the Senate "the sole Power to try all Impeachments," Art. I, § 3, Cl. 6, commits the impeachment trial process exclusively to that body and renders legal actions challenging the Senate's procedures nonjusticiable. Pet. App. 4a, 8a, 10a. He found that the history of the Constitution's impeachment provisions further demonstrated that "the framers simply assumed that courts had nothing whatever to do with impeachments." *Id.* at 8a.[8] Judge Williams concluded that the textual commitment of impeachment trials to the Senate, but-

[8] Judge Williams explained that the Framers relied on structural safeguards other than judicial review—including the division of impeachment powers between the two Houses, the two-thirds majority requirement in the Senate, and the political accountability of members of Congress—to protect the impeachment process from abuse. Pet. App. 8a-9a.

tressed by that history, justified invocation of the political question doctrine of nonjusticiability. *Id.* at 10a-15a.[9]

Judge Randolph filed a concurring opinion. Pet. App. 16a-18a. Like Judge Williams, he concluded that "the controlling question" is whether "the judiciary can pass upon the validity of the Senate's procedural decisions." *Id.* at 16a, 18a. Judge Randolph reasoned that "[t]he 'sole Power to try all Impeachments' must include the sole power to set the procedures for trial, as the Senate did here." *Id.* at 16a. If it were otherwise, "judicial review would lead to judicial control." *Id.* at 17a. Judge Randolph found it unnecessary, however, to invoke the political question doctrine to find petitioner's challenge nonjusticiable, stating: "My conclusion that the courts have no such role to play in the impeachment process ultimately rests on my interpretation of the Constitution." *Id.* at 18a.

Judge Edwards disagreed with the majority's conclusion that petitioner's claim is nonjusticiable, but concurred in the judgment. Pet. App. 18a-57a. He concluded that the courts "are not only competent, but duty-bound" to determine what procedures the Framers contemplated in stating that the Senate shall "try" an impeachment. *Id.* at 19a. Reaching the merits, he concluded that the Framers of the Constitution intended the Senate to have more procedural flexibility in conducting impeachment proceedings than a court has in a criminal trial and that historical practice confirms that view. *Id.* at 43a-54a. Judge Edwards noted that the validity of the Senate practice attacked here "seems especially clear" in light of the fact that petitioner conceded that he could be tried in the

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[9] Judge Williams observed that while "textual commitment" provides the "primary reason for invoking the political question doctrine," "the need for finality also demands it." Pet. App. 13a. He explained that the Framers' commitment of final impeachment authority to the Senate, without judicial review, avoided the "chaos" that would result if impeachment proceedings against important government officers were subject to protracted judicial challenges that could undermine the authority of the officers' replacements and "confound matters indefinitely." *Id.* at 14a.

presence of only a small number of Senators, as long as it was done on the Senate floor. *Id.* at 56a.[10]

SUMMARY OF ARGUMENT

I. Petitioner's challenge to the Senate's impeachment trial procedures fails at the outset, because his objections are not justiciable. The Constitution grants the Senate "sole Power" over the trial of impeachments. That conferral commits to the Senate alone the authority to determine how trial evidence shall be collected for the Senate's use. Whether one analyzes the matter under the "political question" doctrine or through direct application of the Impeachment Trial Clause, it is clear that the courts have no role to play in reviewing the Senate's procedures for receiving evidence and taking testimony.

The Impeachment Trial Clause—and specifically its grant of "sole Power to try all Impeachments," U.S. Const. Art. I, § 3, Cl. 6—conveys the Framers' fundamental judgment that the Senate alone shall determine matters of impeachment trial procedure not otherwise spelled out in the constitutional text. The quoted words are a grant of authority, not a limitation on its exercise. Indeed, the Impeachment Trial Clause would confer far less than "sole Power" if it did not give the Senate exclusive authority to determine the structure of the proceedings and to resolve procedural issues, such as how to receive evidence. Significantly, although the Impeachment Trial Clause specifies certain procedures that the Senate must follow, it is silent on the question of how evidence shall be taken. That matter is accordingly left to the Senate's unreviewable discretion.

The Constitution's drafting history and the contemporaneous commentary confirm that the Senate's procedures for receiving evidence are not subject to judicial review.

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[10] In a rehearing petition, petitioner's counsel challenged the precise nature of his concession on this point. After consulting the transcript of oral argument in the court of appeals, Judge Edwards denied the petition. Pet. App. 84a-85a.

Those sources demonstrate that the Framers envisioned the impeachment process as an important check on the President and the *sole* check on an independent judiciary. The Framers therefore placed that process—their only mechanism for removing life tenured federal judges—entirely within a different, politically accountable body. The Framers' design clearly would be subverted if "the judiciary would have final unreviewable power over the one procedure established to restrain excesses in all of its other final and unreviewable powers." Pet. App. 15a.

II. Even if petitioner's challenge were justiciable, it would fail. The issue here is not—as petitioner would have it—whether "trial by committee is unconstitutional." The question instead is whether the Impeachment Trial Clause prohibits the Senate from appointing a committee of its members, pursuant to Senate Impeachment Rule XI, to receive evidence and take testimony for use by the whole body. Plainly, it does not. The Impeachment Trial Clause's grant to the Senate of the power "to try" all impeachments does not dictate that evidence must be received on the Senate floor.

Petitioner argues that the Senate can "try" an impeachment only if the full Senate gathers to see and hear testimony. The Framers' use of the word "try"—particularly when viewed from their lexicon—falls far short of compelling that result. The Senate can "examine" impeachments "as a judge" and act as a "judicial tribunal" by appointing a committee to assemble the evidence relevant to the Senate's collective judgment. The House and Senate have long used such committees when they are called upon to act as "a judicial tribunal" in judging elections, returns, and the qualifications of their members. This Court itself uses an analogous technique—the employment of special masters—when adjudicating original actions. In short, the word "try" simply lacks the limiting character that petitioner ascribes to it.

The Constitution's drafting history and contemporaneous commentary further confirm that the Senate may

appoint a committee to receive evidence for the Senate's use. The Framers did not indicate any intention to restrict how the Senate would receive evidence. To the contrary, Hamilton's *Federalist* essays noted that the Senate's impeachment trial procedures would necessarily be more flexible than those of the courts. Additionally, Hamilton observed that the institution of impeachment was borrowed from England. The House of Lords used committees to hear evidence in impeachment trials, and it is likely that the Framers were aware of that practice. Finally, there is no merit to petitioner's suggestion that the Senate's use of a committee in this case was unfair. Petitioner's removal from office is not attributable to any defect in the Senate's procedures. Rather it is the consequence of his breach of the public trust.

ARGUMENT

I. PETITIONER'S CHALLENGE TO THE SENATE'S IMPEACHMENT PROCEDURES IS NOT JUSTICIABLE

Petitioner challenges the Senate's procedures for receiving evidence in impeachment trials. Specifically, petitioner argues that the Impeachment Trial Clause prohibits the Senate from appointing a Senate committee, pursuant to Senate Impeachment Rule XI, "to receive evidence and take testimony" for use in the impeachment trial. The court of appeals correctly concluded that the courts lack authority to review petitioner's collateral attack on the Senate's evidence-gathering procedures. Judge Williams applied the "political question" doctrine, while Judge Randolph concluded that, " 'political question' or not," the Impeachment Trial Clause confers upon the Senate exclusive authority to determine how evidence shall be received. Whether examined as a "political question" or through direct application of the Constitution's text to the specific issue at hand, it is clear that the Senate's impeachment trial procedures present no justiciable controversy.

A. The Political Question Doctrine Renders Petitioner's Challenge Nonjusticiable

This Court has described as "political" questions certain disputes that, for various reasons, are nonjusticiable. See, *e.g.*, *United States Dep't of Commerce* v. *Montana*, 112 S. Ct. 1415, 1424-1426 (1992); *Baker* v. *Carr*, 369 U.S. 186, 208-237 (1962); *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 39, 42 (1849); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). As the Court has explained, the "political question" doctrine has attributes that "in various settings, diverge, combine, appear, and disappear in seeming disorderliness." *Baker*, 369 U.S. at 210. Although the doctrine is "amorphous and partly prudential," *Morgan* v. *United States*, 801 F.2d 445, 447 (D.C. Cir. 1986) (Scalia, J.), cert. denied, 480 U.S. 911 (1987), it is rooted in basic principles of separation of powers:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

As Judge Williams explains, Pet. App. 4a-10a, the "textual commitment" element of the political question doctrine establishes the nonreviewability of the Senate's conduct of impeachment trials: "If the Constitution makes a 'textually demonstrable commitment' of *any* issue to a 'coordinate political department,' it so commits the conduct of impeachment trials to the Senate." *Id.* at

10a. But another element is present as well. As Judge Williams determined, *id.* at 13a-14a, the conclusion that controversies about impeachment trial procedures are committed to the Senate is buttressed by the "unusual need for unquestioning adherence to a political decision already made." *Baker*, 369 U.S. at 217. The need for finality in the Senate's impeachment judgments is "extreme." Pet. App. 14a. In the context of an impeachment of a President or a Justice of this Court, "the intrusion of the courts would expose the political life of the country to months, or perhaps years, of chaos." *Ibid.*

Although Judge Williams' reading of this Court's decisions caused him to "honor the [political question] doctrine and apply it here," Pet. App. 14a, the same result obtains without invoking the doctrine. As Judge Randolph correctly recognized, a direct application of the Impeachment Trial Clause likewise suffices to render that challenge nonjusticiable.

B. The Impeachment Trial Clause Grants to the Senate the Exclusive Power to Determine How Evidence Shall Be Received in Impeachment Trials

As his "Questions Presented" make clear, petitioner challenges his impeachment conviction on a narrow ground—that the Impeachment Trial Clause forbids the Senate from employing the procedures set forth in Senate Impeachment Rule XI to receive evidence of his misconduct. Petitioner, however, misapprehends the meaning and significance of that constitutional provision. The Impeachment Trial Clause grants exclusive authority to the Senate to determine how such evidence shall be received.

1. *The Impeachment Trial Clause, by its terms, confers exclusive authority to determine impeachment trial procedure*

The Framers crafted the Impeachment Clause and the Impeachment Trial Clause to allocate governmental responsibilities, but left the details of impeachment pro-

cedures to those who would exercise those responsibilities. Their intention is evident from the language they used. The Impeachment Clause states that the House of Representatives "shall have the sole Power of Impeachment." U.S. Const. Art. I, § 2, Cl. 5. Similarly, the Impeachment Trial Clause states that the Senate "shall have the sole Power to try all impeachments," subject only to three structural limitations on the impeachment trial process. U.S. Const. Art. I, § 3, Cl. 6. See p. 3, *supra*. The quoted words confer authority; they are not limitations on its exercise.

The Constitution's grant of "sole Power" in this context is both striking and significant. "Nowhere else does the Constitution explicitly confer on a body the 'sole' power to do anything." Pet. App. 4a. The text conveys a fundamental judgment that, in our political system, the House of Representatives and the Senate—rather than a court—are the appropriate bodies, respectively, to impeach and to try impeachments. The Framers concluded that only politically accountable representatives—rather than a life tenured judiciary—should exercise authority to remove from office those federal officers who have violated the public trust.[11]

The Constitution's grant to the Senate of the "sole Power to try all Impeachments" vests in the Senate alone the authority to determine matters of impeachment trial procedure not otherwise specified in the constitutional text. The Impeachment Trial Clause would confer far less than the "sole Power to try all Impeachments" if it did not give the Senate sole power to determine the structure of the proceedings and to resolve procedural

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[11] As Alexander Hamilton explained in urging ratification of the Constitution, the Framers selected the Senate as the appropriate tribunal because impeachable offenses are "of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." *The Federalist* No. 65, at 439 (J. Cooke ed. 1961). Accord 1 J. Story, *Commentaries on the Constitution of the United States* 547 (5th ed. 1905) ("the power partakes of a political character, as it respects injuries to the society in its political character").

issues, such as how to receive evidence and take testimony. As petitioner himself strenuously argues, a grant of power to "try" conveys more than the power "merely to 'judge' or 'vote on.'" Pet. Br. 26. It also includes the power to formulate rules of procedure ensuring the fairness and efficiency of the impeachment trial.

That conclusion is dictated not only by what the Impeachment Trial Clause says, but by what it does *not* say. The Clause designates no procedures for the Senate's trial of impeachments save three: (a) the Senators must be under oath; (b) the Chief Justice shall preside when the President is tried; and (c) two-thirds of the Senators present must concur for conviction. The Impeachment Trial Clause says nothing about other procedures, such as rules for presenting and prosecuting articles of impeachment, questioning of witnesses, and receiving of evidence. That silence is telling. The Framers gave fastidious attention to structural limitations on conferred powers, but they plainly concluded that a Senate subject to the three stated limitations—and electoral accountability—could be trusted to complete the impeachment trial process through appropriate rules of procedure.[12]

The Constitution's grant of power to the Senate to determine impeachment trial procedure is hardly surprising. The document, after all, is a basic charter of government, not a compendium of procedure. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("we must never forget that it is a *constitution* that we are expounding").[13] The Framers explicitly confirmed that

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[12] Cf. *Dillon* v. *Gloss*, 256 U.S. 368, 373 (1921) (Article V "is intended to invest Congress with a wide range of power in proposing amendments" and "subjects this power to only two restrictions."); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (The Commerce Clause power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.").

[13] See, *e.g.*, *Dillon* v. *Gloss*, 256 U.S. at 376 ("As a rule the Constitution speaks in general terms, leaving Congress to deal with

understanding through the Rulemaking Clause, which provides that "[e]ach House may determine the Rules of its Proceedings," U.S. Const. Art. I, § 5, Cl. 2. This Court concluded more than a century ago that, in the usual situation, such rules are subject to only limited judicial review:

> Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts, the question is only one of power.

United States v. *Ballin*, 144 U.S. 1, 5 (1892). When, as here, the Constitution grants the House and Senate the "sole Power" to conduct a particular function—namely, the impeachment process—the procedures they select are beyond the scrutiny of the Judicial Branch.

2. *The drafting history and contemporaneous commentary confirm that the Senate's impeachment trial procedures are not subject to judicial review*

The proceedings of the Constitutional Convention confirm that challenges to the Senate's impeachment trial procedures are not justiciable. As the court of appeals pointedly observed, "the parties have not identified a single statement in either the framers' or ratifiers' debates alluding even to the possibility of judicial review, and [Raoul] Berger, its ardent proponent, acknowledges the absence of any such mention at the state conventions." Pet. App. 9a. The obvious implication is that no such review was contemplated. That inference is all the more powerful in light of the Framers' sense of the limited role of the Judicial Branch.[14]

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subsidiary matters of detail as the public interests and changing conditions may require.").

[14] As the court of appeals noted, Hamilton identified judicial review as a check on unconstitutional bills of attainder, ex post facto laws, and statutes, but he made no reference to judicial review of

The inference is further strengthened by the practical concerns that did occupy the Framers' deliberations. As petitioner himself acknowledges, the Framers "struggled for months over *what entity* should have such ultimate power and *how to control its exercise.*" Pet. Br. 3 (emphasis added).[15] After careful reflection, the Framers placed the impeachment and removal power *outside* the Judicial Branch. Such "a deliberate change made by the Framers" carries great significance. *Buckley* v. *Valeo*, 424 U.S. 1, 129 (1976) (shift of the appointment power from the Senate to the President). Additionally, the Framers determined to control the exercise of the impeachment power primarily through division of that power between the two Houses; the two-thirds majority requirement in the Senate; and the political accountability of members of Congress—*not* through judicial review of impeachment procedures. See Pet. App. 8a-9a.

Judicial review would be fundamentally inconsistent with the Framers' expressed objectives. For example, the

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impeachment proceedings. See *The Federalist* No. 78 (J. Cooke ed. 1961).

[15] See 1 *The Records of the Federal Convention of 1787*, at 21-22 (M. Farrand ed. 1966) [hereinafter Farrand] (Virginia Plan proposed that a "National Judiciary" have jurisdiction "to hear and determine * * * impeachments of any National officers") (ninth resolved clause); 1 Farrand 23 & n.14, 3 Farrand 608 (South Carolina proposal that Senate and federal Court form a court to try impeachments); 3 Farrand 600 (alternative statement of South Carolina proposal that Supreme Court try impeachments); 1 Farrand 85 (Delaware proposed that the Executive be removable by Congress on the request of the state legislatures); 1 Farrand 244 (New Jersey Plan proposed that "federal Judiciary * * * have authority to hear & determine in the first instance on all impeachments of federal officers"); 2 Farrand 178-179, 186 (Committee of Detail proposal that the Supreme Court try impeachments); 2 Farrand 367 (Committee of Detail proposed addition specifying that, in impeachments of Supreme Court Justices, Senate shall try impeachments); 2 Farrand 592 (final version providing that the Senate shall have the sole power to try all impeachments).

debates at the Constitutional Convention reveal that the Senate—rather than the Supreme Court—was advocated as the appropriate impeachment tribunal for the President, because the Court "were too few in number and might be warped or corrupted." 2 Farrand 551 (G. Morris). Additionally, the Court was perceived as an improper forum to try the President "because the Judges would be appointed by him." *Ibid.* (R. Sherman).[16] Those concerns similarly militate against judicial review of a Senate impeachment trial, whereby the will of a single appointed judge could reverse the Senate's collective decision.[17]

In view of the Framers' assiduous attention to checks and balances among coordinate branches of government, it is highly improbable that the Framers envisioned any role for judicial review of Senate impeachment procedures in the removal of federal judges. As Alexander Hamilton explained in *The Federalist* No. 79, the impeachment power is the sole basis for constraining the

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[16] As Hamilton explained, the Convention "thought the Senate the most fit depositary of this important trust." *The Federalist* No. 65, at 440 (J. Cooke ed. 1961). "What other body would be likely to feel *confidence enough in its own situation*, to preserve unawed and uninfluenced the necessary impartiality between an *individual* accused, and the *representatives of the people, his accusers?*" *Id.* at 441 (emphasis in original).

[17] The Framers did ultimately specify that the Chief Justice would preside over the trial of a sitting President. They included that requirement to resolve the palpable conflict of interest that would arise if the Vice President—the normal presiding officer, U.S. Const. Art. I, § 3, Cl. 4,—were to preside. See 1 J. Story, *supra*, at 557. That resolution would have not have commended itself—particularly in light of the Framers' acute concern for conflicts of interest—if the Framers had envisioned that the trial would be subject to judicial review. Article III contains no grant of original jurisdiction to this Court over challenges to impeachment decisions, and it would be peculiar indeed for the Chief Justice's procedural rulings to be subject to review in the lower courts.

excesses of appointed and life-tenured judges.[18] He later emphasized:

> This is alone a complete security. There can never be a danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords at the same time a cogent argument for constituting the senate a court for the trial of impeachments.

The Federalist No. 81, at 546 (J. Cooke ed. 1961). As the court of appeals observed, "Hamilton's emphatic language would have fallen rather flat if candor had compelled him to add that, of course, the judges themselves would sit in final judgment over this check on their excesses." Pet. App. 6a. Cf. *Goldwater* v. *Carter*, 444 U.S. 996, 1001 n.2 (1979) (Powell, J., concurring).[19]

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[18] "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified from holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges." *The Federalist* No. 79, at 532-533 (J. Cooke ed. 1961).

[19] As the court of appeals additionally observed, the fact that the Framers envisioned "distinct, independent forums" for the impeachment trial and for a criminal trial, provides yet another indication that they did not intend that the Senate trial would be subject to judicial review. Pet. App. 6a-7a. See *The Federalist* No. 65, at 442 (J. Cooke ed. 1961).

3. *Neither this Court's interpretive function nor the separation of powers doctrine mandates judicial review of the Senate's impeachment trial procedures*

Petitioner advances two arguments in support of judicial review of the Senate's impeachment trial procedures: (a) the Impeachment Trial Clause allows it (Pet. Br. 40-46); and (b) separation of powers requires it (*id.* at 46-50). Both arguments are flawed. Properly interpreted, the Impeachment Trial Clause commits the question of appropriate procedures to the Senate, and the separation of powers principle requires the Court to respect that grant of authority.

a. Petitioner contends that this Court should review his challenge because "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" Pet. Br. 40 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177). He argues that, under that principle, courts are entitled to give content to the Impeachment Trial Clause's use of the term "try." In essence, petitioner urges this Court to use the Impeachment Trial Clause—and specifically its use of the word "try"—to create a federal common law of impeachment trial procedure.

Petitioner's vision of this Court's role under the Constitution is only partially correct. The Court is surely responsible for interpreting the Constitution, but it fulfills that interpretive duty by declaring what the Impeachment Trial Clause clearly states: "The Senate shall *have the sole Power to* try all Impeachments" (emphasis added). The text does *not* say, as petitioner would have it, that the Senate "shall try all Impeachments." The Framers' grant of "sole Power"—rather than a simple direction to "try"—has controlling importance. As we have explained, that specification unambiguously grants to the Senate alone authority to determine impeachment trial procedures, including how evidence shall be received in impeachment trials. Courts are not entitled to exercise

that power indirectly through judicial construction of the word "try." [20]

Petitioner recognizes that the role he envisions for the courts in determining impeachment trial procedure has long been rejected as incompatible with the constitutional requirement that the Senate shall have the "sole Power" to try impeachments. See *Ritter* v. *United States*, 84 Cl. Ct. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937).[21] Petitioner nevertheless suggests resolving the inconsistency by discounting the significance of the Framers' words. According to petitioner, "the word 'sole' cannot carry the immense significance so conferred on it," because "the term was a cosmetic edit inserted by the Committee of Style at the tail end of the Convention." Pet. Br. 42. That argument is without merit.

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[20] The consequences of a court's specifying the Senate's impeachment trial procedures are daunting:

> If the Senate did not have the sole power to determine how to conduct the proceedings, if the judiciary had the final say on what procedures the Senate must put in place, it is only a short step to judicial review of the Senate's compliance with those procedures. Once that dike bursts, there can be no holding back the flood of issues that inevitably will be presented to the courts.

Pet. App. 16a (Randolph, J., concurring). Indeed, former Judge Hastings has filed an action, currently pending in the district court, challenging not only the use of an evidentiary committee in his impeachment trial, but also the fairness of numerous procedural rulings, including scheduling decisions. *Hastings* v. *United States*, Civ. No. 91-1713 (D.D.C. filed July 15, 1991).

[21] Only 30 years ago, the prospect of judicial review of a Senate impeachment decision appeared incredible. As Professor Herbert Wechsler rhetorically asked, "Who, for example, would contend that the civil courts may properly review a judgment of impeachment when article I, section 3 declares that the 'sole Power to try' is in the Senate?" Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 8 (1959). See also, *e.g.*, C. Black, *Impeachment: A Handbook* 63 (1974); C. Wright, *The Law of Federal Courts* § 2.15, at 109 (3d ed. 1986); Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 Ky. L. J. 643, 674 (1987-1988); Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L. J. 707, 728-732 (1987-1988).

The Constitution's ratified text is the authoritative guide to the structure of our government. Although that text was successively drafted and redrafted—first by the Committee of the Whole (consisting of all 55 members), then by the Committee of Detail (consisting of five members), and finally by the Committee of Style (also consisting of five members)—only the final draft can truly be said to capture the complete intent of the Framers and the full understanding of the ratifying States. That final draft submitted by the Committee of Style is, after all, what the Framers approved and the People, through their State Conventions, ratified.

Petitioner nevertheless contends that the Committee of Style's changes should be "stripped of substantive significance" because the Committee was appointed only "'to revise the stile of and arrange the articles which had been agreed to.'" Pet. Br. 42 (quoting 2 Farrand 553). This revisionist approach is doubly flawed. First, the Committee of Style's revisions were extensive and included some substantive changes, such as adding the prohibition, contained in U.S. Const. Art. I, § 10, Cl. 1, against State impairment of contracts.[22] Second, even assuming that the Committee performed only a narrowly limited function, its use of the word "sole" is entitled to no less weight than any other word of the text, because the Committee revision perfected what "had been agreed to."[23] There is no reason to doubt that the members of the Committee of Style—William Samuel Johnson, Gouverneur Morris, Alexander Hamilton, James Madison, and Rufus King—accurately captured and clarified the

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[22] See 1 *1787 Drafting the U.S. Constitution* 1083-1084 (W. Benton ed. 1986); compare 1 *id.* at 1087-1088.

[23] Petitioner's contrary argument misapplies the reasoning of *Powell* v. *McCormack*, 395 U.S. 486, 538-539 (1969). The Court in that case rejected an argument that attached substantive significance to the Committee of Style's changes. In doing so, the Court did not question that the Constitution's final wording—and not the intermediate drafts—authoritatively expresses the Framers' intent.

Convention's intent. And indeed, the Convention itself put any such doubts to rest by approving the text they submitted. See 2 Farrand 663-667.[24]

Petitioner argues, more generally, that the Court should review his challenge because "interpreting constitutional limits is the business of the courts." Pet. Br. 43. That argument, however, takes petitioner nowhere. Petitioner concedes that he was duly impeached by the House for impeachable offenses. He does not dispute that the Senate had power to remove him from office. And he does not contend that the Senate violated the three express procedural provisions (see p. 18, *supra*) on trial of impeachments. Rather, petitioner argues that the Impeachment Trial Clause restricts the procedures that the Senate may use to receive evidence. But petitioner is simply making this up; as we have explained, the Impeachment Trial Clause contains no such limitation. Accordingly, there is no justiciable dispute for the courts to decide.[25]

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[24] Petitioner is similarly mistaken in arguing that the Senate did not exercise its "sole" power in this case. See Pet. Br. 42-43. The full Senate both adopted the Senate Impeachment Rules, see S. Doc. No. 1, *supra*, at 183, and approved the application of Senate Rule XI to petitioner's case. See p. 7, *supra*. The full Senate also denied petitioner's motion to hear testimony on the Senate floor. See p. 9, *supra*. Petitioner errs in attempting to draw inferences from the exclusion of impeachment convictions from the President's pardon power, U.S. Const. Art. II, § 2, Cl. 1. See Pet. Br. 43. As the court of appeals explained, "[w]hile the absence of any such express limitation on judicial interference might support an 'expressio unius' argument in favor of judicial review, a more plausible reading is that the framers simply assumed that courts had nothing whatever to do with impeachments." Pet. App. 8a.

[25] Petitioner cites *Powell* v. *McCormack*, *supra*, and other cases for the proposition that "even when the Constitution assigns a power to a coordinate political branch this Court must still judge whether that branch has complied with the textual limitations on its power." Pet. Br. 43-44. But if the Impeachment Trial Clause does not impose a limitation on the Senate's methods for receiving evidence, then there is no question of compliance to judge. See Pet. App.

b. Petitioner also contends that the principle of separation of powers requires judicial review of his challenge to the Senate's impeachment procedures. He contends that if the Senate has "the unreviewable power, not only to conduct impeachment trials, but to construe the constitutional provisions that govern that power," the danger arises that the Legislative Branch would assume judicial power. Pet. Br. 48. If we are correct, however, that the Impeachment Trial Clause expressly confers power on the Senate alone to determine impeachment trial procedure, then the Senate's exercise of that function is, by constitutional design, wholly within its purview. Cf. *INS* v. *Chadha*, 462 U.S. 919, 955 (1982) (dictum).

Petitioners' position, if accepted, would seriously erode the Framers' conception of our system of government. As Hamilton explained, pp. 21-22, *supra*, the Framers formulated the impeachment power as the sole check on a life-tenured judiciary. The practical effect of adopting petitioner's position would be to place ultimate control over the impeachment process in the *same* body that the impeachment process was intended to regulate. Petitioner provides no basis for this fundamental departure from the Framers' design.[26] The consequences of that

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10a-13a (distinguishing *Powell* under a "political question" analysis); *id.* at 18a (Randolph, J., concurring) (distinguishing *Powell* under a direct textual analysis). Petitioner also cites *United States Dep't of Commerce* v. *Montana*, *supra*, for the proposition that the "political question" doctrine would apply only if all congressional decisions relating to impeachment are beyond judicial review. See Pet. Br. 45. Obviously, there is no occasion to reach that issue if the text of the Constitution renders the specific matter at issue here—the Senate's procedures for receiving evidence—nonjusticiable. Nor does it logically follow from an assumption that there could be judicial review of a claim that one of the express limitations had been transgressed—*e.g.*, that the Senate sought to remove an officer who had not been impeached by the House—that there would be judicial review of any claim relating to impeachment.

[26] Even if it were permissible for this Court to second-guess the Framers' grant to the Senate of the sole power to try impeachments, no basis exists for challenging the Framers' placement of trust in

departure are ominous. As the court of appeals explained, "the judiciary would have final unreviewable power over the one procedure established to restrain excesses in all its other final and unreviewable powers." Pet. App. 15a. The Framers, who were intent on leaving no branch of government unchecked, could not have intended such a result.[27]

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that body. Petitioner's protestations to the contrary, there is no reason to doubt that the Senate is institutionally capable of formulating appropriate rules for making factual determinations in its impeachment trials. Nor is there any reason to presume that the Senate, whose numerous Members take the same oath as Members of this Court—and additionally are subject to electoral accountability—will act in a lawless or malicious manner. Cf. *Webster* v. *Doe*, 486 U.S. 592, 613 (1988) (Scalia, J. dissenting).

[27] Significantly, if the Senate's impeachment procedures are subject to judicial review, it is unclear where that inquiry should begin or where it will end. Judge Edwards' suggestion that the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, provides petitioner with a cause of action to review the Senate's procedures (Pet. App. 25a) appears, at best, dubious. See 5 U.S.C. 551(1)(A) ("agency" under the APA "does not include * * * the Congress"). But assuming such a cause of action, what relief should a court give? Could a court order petitioner's reinstatement as a federal judge? If his seat has been filled—as indeed, petitioner's has—could the court order Congress to create a new judicial opening? The consequences of judicial review could be especially unsettling in the case of impeachment of the President or a Chief Justice. "Even if the courts qualified a finding of justiciability with a rule against stays or specific relief of any kind, their review would undermine the new President's or Chief Justice's legitimacy for at least as long as the process took. And a declaratory action *without* final relief awarding the office to one person or the other could confound matters indefinitely." Pet. App. 14a. Petitioner has provided no answer to those important practical concerns.

II. THE IMPEACHMENT TRIAL CLAUSE DOES NOT PROHIBIT THE SENATE FROM RECEIVING EVIDENCE THROUGH THE PROCEDURES SET OUT IN SENATE IMPEACHMENT RULE XI

The Impeachment Trial Clause grants to the Senate the "sole Power to try all Impeachments," including the subsidiary power to determine appropriate procedures for receiving evidence. But even if, as petitioner argues, the Impeachment Trial Clause gives the courts license to review the Senate's procedures, Senate Impeachment Rule XI would be valid. Contrary to petitioner's contentions, the Impeachment Trial Clause does not prohibit the Senate from appointing a committee of its Members to receive evidence for use by the whole body.

A. The Impeachment Trial Clause, By Its Terms, Does Not Prohibit The Senate From Appointing A Committee To Receive Evidence For The Senate's Use

The caption to petitioner's argument suggests that the issue in this case is whether "trial by committee is unconstitutional." Pet. Br. 25. But that is not the issue here. The question presented (Pet. Br. i) is whether the Impeachment Trial Clause prohibits the Senate from exercising discretion to appoint a committee to "receive evidence and take testimony." See Senate Impeachment Rule XI, S. Doc. No. 1, *supra*, at 186-187. The Impeachment Trial Clause plainly does not prohibit that practice. Indeed, as petitioner's arguments demonstrate, such a prohibition can be created only by distorting the constitutional text.

Petitioner principally contends that the Impeachment Trial Clause prohibits the practice because the Senate is obligated to "try" all impeachments. A requirement that the Senate "try" impeachments, however, does not prohibit the Senate from assigning evidence-gathering tasks to a committee of its Members. The absence of such a prohibition is especially apparent when the word "try" is examined from the viewpoint of the Framers. In the

Framers' era, the verb "to try" did not necessarily denote a formal courtroom adjudication; it more broadly meant "to examine," "to examine as a judge," or "to bring before a judicial tribunal." See 2 S. Johnson, *A Dictionary of the English Language* (1755).[28]

Under the Framers' usage, the Senate may "try" an impeachment by conducting all proceedings, including the receipt of evidence, on the Senate floor. But the Framers' use of the word "try" does not *require* that procedure. A specification that the Senate "examine" impeachments "as a judge" and act as a "judicial tribunal" does not prevent the Senate from appointing a committee to assemble and present the evidence relevant to the Senate's collective judgment. Indeed, the House and the Senate have long used committees to gather evidence when acting as "the Judge of the Elections, Returns and Qualifications of its own Members" (U.S. Const. Art. I, § 5)—a role in which the House or Senate is clearly acting as "a judicial tribunal." *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 616 (1929).[29]

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[28] Petitioner does not dispute that definition. See Pet. Br. 28 n.28. See also *Hastings*, 716 F. Supp. at 40-41 ("at the time the Constitution was drafted, definitions of 'try' included 'to sit in judgment' and 'to examine (a person) for the purpose of testing his qualifications' ") (quoting *Oxford English Dictionary*); see, *e.g.*, 2 Farrand 67 (Rufus King) (the President, like members of Congress, "would periodically be *tried* for his behavior by his electors") (emphasis added).

[29] As this Court has explained in *Barry*, the Constitution confers on Congress certain powers that are "judicial in character," including "the power to judge of the elections, returns and qualifications of its own members." 279 U.S. at 613. "In exercising this power, the Senate may, of course, devolve upon a committee of its members the authority to investigate and report; and this is the general, if not the uniform, practice." *Ibid.* See also *Reed* v. *County Comm'rs*, 277 U.S. 376, 388 (1928); *Morgan*, 801 F.2d at 446; 7 Annals of Cong. 33-44 (1797) (expulsion of Senator William Blount). Similarly, the Senate has long used committees to receive evidence when performing the judicial task of trying legislative contempts. See *Groppi* v. *Leslie*, 404 U.S. 496, 501 (1972).

Similarly, when a court conducts a formal adjudication, it may, as one part of the trial procedure, appoint a subordinate, such as a special master, to receive evidence and take testimony. See *Ex parte Peterson*, 253 U.S. 300, 312-313 (1920). A federal court's "inherent power" to appoint a special master, which courts have exercised "[f]rom the commencement of our Government," *id.* at 312, is now embodied in Fed. R. Civ. P. 53. Significantly, Rule 53 allows the master broad powers in receiving evidence and taking testimony for use by the court:

> The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses under oath and may examine them and may call the parties to the action and examine them upon oath.

Fed. R. Civ. P. 53(c).[30] Indeed, for more than 100 years, this Court has employed special masters to receive evidence and take testimony in original cases. See, *e.g.*, *Wyoming* v. *Oklahoma*, 112 S. Ct. 789 (1992); *Ohio* v. *Kentucky*, 410 U.S. 841, 644 (1973); *Arizona* v. *California*, 373 U.S. 546, 551 (1963); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 50 U.S. (9 How.) 647, 657-659 (1850). The Court plainly does not disregard its duty to adjudicate original actions by employing special masters to perform evidence-gathering functions.[31]

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[30] Rule 53(e) further states that in "an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous," Fed. R. Civ. P. 53(e)(2), while in "an action to be tried by a jury" the "master's findings * * * are admissible as evidence," Fed. R. Civ. P. 53(e)(3).

[31] See also 28 U.S.C. 636(b)(1) (allowing magistrate judges to conduct hearings); Pet. App. 55a-56a (noting that administrative agencies employ hearing examiners) (Edwards, J., concurring);

Petitioner accordingly is mistaken in asserting that the Framers' use of the word "try" prohibits the Senate from appointing a committee to receive evidence. That word simply lacks the limiting character that petitioner ascribes to it. Petitioner's citations to other Impeachment Trial Clause terms, such as "sitting," "present," "convict," "preside," and "oath" are similarly unavailing. See Pet. Br. 25-26. Those terms, even when viewed collectively, do not prohibit the Senate from conducting an impeachment trial in which—as one aspect of the proceeding—the Senate appoints a committee for the limited purpose of gathering evidence for the whole body. Petitioner's additional citations to the Framers' use of "trial" and "convicted" in Article III (Pet. Br. 27-28) are also unavailing. It is clear from the language and context that Article III prescriptions do not apply to Senate impeachment trials.[32]

B. The Drafting History And Contemporaneous Commentary Confirm That The Senate May Appoint A Committee To Receive Evidence For The Senate's Use

The absence of any textual prohibition on the Senate's use of a committee to receive evidence should be dispositive of petitioner's claim. The drafting history and contemporaneous commentary provide additional confirma-

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Hastings, 716 F. Supp. at 41 ("persons and bodies may sit in judgment without having received evidence in the manner Article III courts try criminal charges").

[32] The Framers' provision in Article III that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" (U.S. Const. Art. III, § 2, Cl. 3) reveals, perhaps, the Framers' expectation that impeachment trials would bear some similarity to judicial trials. But that does not mandate a constitutional requirement that Senate impeachment trials conform exactly to court procedure. Indeed, by placing the impeachment trial power in the Senate and by excepting impeachment trials from the jury requirement, the Framers demonstrated a clear understanding that impeachment trial procedure would *differ* from normal court procedure. See Pet. App. 44a (Edwards, J., concurring).

tion that no such prohibition exists. As petitioner must concede, the Framers did not evince any intention to restrict how the Senate should receive evidence. At the same time, Hamilton's *Federalist* essays reveal the Framers' understanding that although Senate impeachment trials would have "judicial" characteristics, the Senate could adopt flexible procedures. Such practices plainly could include the English practice of appointing a committee to take evidence.

Hamilton explained in *The Federalist* No. 65 (J. Cooke ed. 1961), that the Senate would conduct impeachment trials in a "judicial character as a court." *Id.* at 439. But he also noted that the "institution" is "designed as a method of NATIONAL INQUEST into the conduct of public men." *Id.* at 440. In justifying the use of the Senate for that purpose, he stated:

> The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the Judges, as in common cases serve to limit the discretion of courts in favor of personal security.

Id. at 442. Hamilton's recognition of the need for procedural flexibility was echoed in the Senate in the first impeachment trial, the impeachment of Senator William Blount in 1798.[33] And Hamilton's point was reiterated by Justice Story in his *Commentaries on the*

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[33] A report of the Senate debate notes the statement of Senator James Ross that the proceeding "was not like a criminal prosecution in the forms of process * * *. It was neither a criminal nor civil prosecution but a trial by impeachment. The mode of proceeding was not according to the forms of the common law, but according to forms attached to that particular mode of trial." Aurora, Feb. 28, 1798, at 2, col. 2 (available in Library of Congress, Serial and Government Publications Division). See also Pet. App. 46a-47a & n.16.

Constitution of the United States, the first major treatise on the document. See 1 J. Story, *supra*, at 559-560.[34]

As Hamilton described, the Framers drew the Constitution's impeachment provisions largely from historical experience, and English practice was the model "from which the idea of this institution has been borrowed." *The Federalist* No. 65, at 440 (J. Cooke ed. 1961). Significantly, the House of Lords used the very procedural device at issue here in its impeachment proceedings. The historical record "shows beyond doubt that the House of Lords used committees to hear evidence during impeachment trials in the early 17th century." Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U. L. Rev. 512, 531 (1975). See Pet. App. 48a-50a, 53a-54a (Edwards, J., concurring).[35]

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[34] Justice Story observed that when acting as a court of impeachment, the Senate is "confined as little as possible to strict forms." 1 J. Story, *supra*, at 560. He explained:

> [T]he strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments. The very habits growing out of judicial employments, the rigid manner in which the discretion of judges is limited and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents, and the adherence to technical principles, which, perhaps, distinguishes this branch of the law more than any other, are all ill adapted to the trial of political offences in the broad course of impeachments.

1 J. Story, *supra*, at 559-660.

[35] This history may be traced at least as far back as the impeachment trial of Sir Francis Bacon in 1620, where the House of Lords "appointed a select Committee of themselves, to take Examination of Witnesses." 2 T. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, at 1101 (1816); see also *id.* at 1116 (House of Lords appointed committee to examine witnesses in trial of Dr. Field, Bishop of Landaff, in 1620); *id.* at

The House of Lords' use of committees to receive evidence is highly pertinent because it sheds light on the Framers' understanding of how Senate impeachment trials might be conducted. Petitioner discounts the importance of the English historical practice (Pet. Br. 31 n.29), but he cannot deny that it existed. His suggestion that the Framers were ignorant of the English practice seems especially doubtful. Although the English precedents provide "no direct reference to the use of committees" during the Framers' era, the procedure that the House of Lords adopted in the 17th Century "has never been banned or disavowed." Williams, *supra*, 50 N.Y.U. L. Rev. at 532.[36]

1122-1124 (House of Lords examined witnesses in three committees in trial of Sir Giles Mompesson in 1620).

The most complete description of the House of Lords' use of evidentiary committees in impeachment trials is drawn from the trial of Lionel Cranfield, Earl of Middlesex and Lord Treasurer, in 1624. Following the presentation of charges by the House of Commons, the House of Lords "divided themselves into committees to examine witnesses." E. Foster, *The House of Lords, 1603-1649*, at 157 (1983). The Lords examined a "great number" of witnesses in committee and furnished Cranfield with copies of the written depositions " 'of all Witnesses, as well against him as for him.' " *Id.* at 158, 283 n.52 (quoting House of Lords Journals).

Following the receipt of all evidence, Cranfield was brought to the bar of the House of Lords. The charges were presented, and "[t]he clerk read the depositions of witnesses as proof. The lord treasurer [Cranfield] spoke in reply." E. Foster, *supra*, at 158. Following Cranfield's "recapitulat[ion of] his defense," the Lords deliberated and voted. *Id.* at 159. Because the Lords "seem to have been well content with what they had done" at the Cranfield trial, "[t]hey summed up their experience in Standing Orders concerning judicature, which would guide them in the future." *Id.* at 160. These Standing Orders provided for the receipt of testimony in committee by requiring that "[d]efendants should have copies of all depositions, as had been resolved in Cranfield's case." *Ibid.*

[36] The absence of evidence of committee use during the Framers' era is attributable, in part, to the decline in the English use of impeachment. See Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 Yale L.J. 1419, 1433 (1975) (5 completed trials between 1626 and 1715); P. Hoffer & N. Hull,

Petitioner does not dispute that the Framers' contemporary, Thomas Jefferson, clearly *was* aware of that practice. Jefferson documented that procedure in the parliamentary manual that he prepared for the Senate's use while serving as the President of that body from 1797 to 1801. See *Jefferson's Parliamentary Writings: "Parliamentary Pocket-Book" and A Manual of Parliamentary Practice* (W. Howell ed. 1988) [hereinafter *Jefferson Manual*].

Jefferson derived his rules of Senate procedure from "the precepts of the Constitution, the regulations of the Senate, and where these are silent, of the rules of Parliament." *Jefferson Manual* 355. He described the House of Lords' practice of appointing committees to obtain evidence as follows:

> The practice is to swear the witnesses in open House, and then examine them there: or a committee may be named, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand.

Jefferson Manual 424.[37] Jefferson's description is both accurate and authoritative. Indeed, Jefferson's manual "is regarded by English parliamentarians as the best state-

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Impeachment in America, 1635-1805, at 267 (1984) ("impeachment had just about disappeared from the English constitutional horizon between 1718 and 1786"). Thus, it is likely that the Framers would have looked to 17th Century English practice in studying the English "model." See E. Foster, *supra*, at 162 ("The procedure that [the Lords] had established in 1621 and 1624 did not greatly change. They had worked it out in considerable detail and had taken care to record what had been done. The procedure would serve as a precedent and model for the future.").

[37] Jefferson derived his description of impeachment trial procedure from a Parliamentary Pocket-Book that he compiled beginning in the late 1760s and that was a "source-book" for his subsequent manual. See *Jefferson Manual* 8, 43, 155. Jefferson had completed the section on impeachment by the time of the Blount impeachment in 1798 and provided a copy to the Senate committee charged to study procedures for the Blount trial. See *id.* at 12-13.

ment of what the law of Parliament was at the time Jefferson wrote it."[38]

Given Jefferson's knowledge of the House of Lords' procedure, it is likely that his contemporaries, who had studied English impeachment and used it as their "model" in drafting the Constitution, were aware of that procedure as well. See Williams, *supra*, 50 N.Y.U. L. Rev. at 539. Even apart from Jefferson's documentation of the House of Lords' practice, its existence "and the absence of any affirmative rejection of it by the American framers, effectively refutes the suggestion that the use of committees in impeachment trials would have been alien or repulsive to those who designed the Constitution." Pet. App. 53a (Edwards, J., concurring).[39]

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[38] *Constitution, Jefferson's Manual and Rules of the House of Representatives*, H.R. Doc. No. 248, 100th Cong., 2d Sess. § 284, at 115 n.*a* (1988). See also *Goldwater* v. *Carter*, 617 F.2d 697, 718 (D.C. Cir.) (in banc) (reliance on the manual "as a guide for Congressional procedure persists to this day") (MacKinnon, J., dissenting in part), vacated on other grounds, 444 U.S. 996 (1979).

[39] Petitioner's dismissal of Jefferson's views on the ground that he was not a Convention delegate (Pet. Br. 32-33) and that he had a mistaken vision of the American impeachment process (*id.* at 33 n.32) is misdirected. Jefferson's manual is obviously pertinent because it confirms American familiarity with the English historical practice of using committees to collect impeachment evidence. Petitioner's suggestion that Jefferson was biased (*ibid.*) is also misplaced. Indeed, this Court's specific citation to Jefferson's parliamentary manual and its frequent citations to his other writings manifest the value of Jefferson's views. See, *e.g.*, *Hutchinson* v. *Proxmire*, 443 U.S. 111, 125 (1979) (Speech or Debate Clause); *United States* v. *Brown*, 381 U.S. 437, 446 n.20 (1965) (Bill of Attainder Clause). *Tenney* v. *Brandhove*, 341 U.S. 367, 375 n.4 (1951) (Speech or Debate Clause); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 642 n.10 (1952) (Jackson, J., concurring) (War Powers Clause).

C. Neither Separation of Powers Principles, Nor Prior Senate Practice, Nor General Principles of "Fairness" Prohibit the Senate From Appointing a Committee to Receive Evidence

Petitioner challenges Senate Impeachment Rule XI on three additional nontextual grounds. He argues that: (1) separation of powers requires receipt of evidence before the full Senate (Pet. Br. 28-31); (2) the Senate in the past received evidence in that manner (*id.* at 31-33); and (3) petitioner's interest in "fairness" overrides the Senate's interest in efficient management of its duties (*id.* at 33-34). None of those arguments has merit.

1. Petitioner contends that the Senate acts as the "numerous court" envisioned by the Framers, *The Federalist* No. 65, at 441, only if evidence is received orally in the Chamber where the full Senate meets. Pet. Br. 28-30. That contention is untenable. As we have noted, the full Senate adopted Senate Rule XI, and the full Senate determined to utilize the rule in petitioner's case. To be sure, the Senate gave the committee a limited role of gathering evidence, identifying "facts that are uncontested," and summarizing "evidence that the parties have introduced on contested issues of fact." App., *infra*, 8a. But the committee exercised even less authority than a special master in a court adjudication—it neither proposed findings of fact nor made a recommendation on the merits. Nor do impeachment committees rule on dispositive legal motions, which are decided by the full Senate. See p. 4 n.3, *supra*. "Whatever the committee's role in *gathering evidence*, the final deliberations and decisionmaking concerning [petitioner's] guilt *were* conducted by the full Senate, fulfilling the framers' intention that conviction or acquittal be decided by a more numerous body." Pet. App. 55a n.19 (Edwards, J., concurring).[40]

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[40] Petitioner's suggestion that the committee summarized the record in a manner that prejudiced him (Pet. Br. 35) is incon-

2. Petitioner next describes the Senate's impeachment trials from the 19th and early 20th Centuries, in which the Senate did receive evidence on the Senate floor, and argues that this practice "confirms that impeachment trials must be conducted before the entire Senate." Pet. Br. 8-12, 31. As Judge Edwards correctly concluded:

> There is simply no basis in the historical record to believe that the Senate's failure to employ a committee during its early impeachment trials reflected any considered judgment that such an alternative was beyond its constitutional authority. Rather, all we know is that, for many years, the Senate apparently found it unnecessary even to consider using evidentiary committees in impeachment proceedings, and none was used; but when circumstances were perceived to be different in 1935, the Senate adopted Rule XI allowing for the use of such committees.

Pet. App. 50a-51a. See *Williams*, *supra*, 50 N.Y.U. L. Rev. at 540-542.[41]

The Senate's historical practice reveals that the body revised its impeachment trial procedures in response to its increased responsibilities. It adopted evidence-gathering techniques that promote the efficiency, while preserving the fairness, of the impeachment trial process. In the early days of the Union, the Senate could receive impeachment evidence on the Senate floor, just as this Court could convene to conduct jury trials. See *Georgia* v. *Brailsford*, 3 U.S. (3 Dall.) 1 (1794). But in the

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sistent with his argument that the committee "proved far more receptive to the arguments of the accused than were their uninformed colleagues" (*id.* at 33). In any event, petitioner had the opportunity to raise such claims before the full Senate, which retained the right to hear additional testimony after submission of the committee report. See S. Doc. No. 1, *supra*, at 186-187.

[41] See also *Ballin*, 144 U.S. at 5 ("It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to prescribe rules is not one which once exercised is exhausted.").

modern era, both the Senate and this Court face vastly greater demands. See *Groppi* v. *Leslie*, 404 U.S. 496, 500 (1972) (noting that "full-blown" legislative trials for contempt could potentially immobilize "vital legislative processes").

The impetus for revising impeachment trial procedures developed at the turn of the century, when Senator Hoar suggested directing the Rules Committee to report whether the Senate "may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of the English House of Lords in such cases, questions of the admission of material testimony and the final argument being reserved for the full Senate." 38 Cong. Rec. 3660 (1904).[42] The Senate acted in 1935, after the 10-day impeachment trial of Judge Harold Louderback. It adopted the optional procedure now embodied in Senate Rule XI, which gives the Senators full access to the relevant evidence, while preserving their ability to conduct other business. 79 Cong. Rec. 8309-8310 (1935). See *Williams*, *supra*, 50 N.Y.U. L. Rev. at 539-542.

The Senate's objective was not to shirk its constitutional obligations, but rather to improve its evidence-gathering process. The committee procedure, which "constitutes a part of the trial by the Senate," 78 Cong. Rec. 9928 (1934) (Sen. Robinson), was designed to make the evidence *more* accessible to the Senate:

> There are times when there is not a quorum of the Senate present, when a dozen may not be here, when there are less than the number provided as the membership of the proposed committee to take the evidence. There is no use expecting all the Senate, or a quorum of the Senate, to be present every minute while evidence is being taken. Senators have read the evidence in the RECORD in order to know what it is.

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[42] Senator (later Justice) Sutherland made a similar proposal in 1912, in the midst of the Senate's 22-day trial of Judge Robert Archbald, noting that "time has been taken away from the important business of the Senate." 49 Cong. Rec. 698 (1912).

Id. at 9929 (Sen. Norris).[43] Senator Norris explained that, following the taking of evidence by a committee, "[t]he trial of the case would take place in the Senate, the evidence would be offered here, and the Senate would pass on it." *Ibid.*[44]

The procedure that the Senate adopted ensures that a complete evidentiary record is assembled for Senate review. Receipt of evidence in committee is far preferable to receipt on the Senate floor, where actual attendance may be less than the attendance in committee and the composition of the group is "constantly changing." Pet. App. 51a-52a (quoting Williams, *supra*, 50 N.Y.U. L. Rev. at 540-542). To observe witnesses testify, those Senators who are not on the committee may attend the committee hearing, watch the live television broadcast, or review the broadcast on videotape. Further, if the full Senate believes that expanded attendance is warranted, all or a relevant part of the evidence may be received on the Senate floor. See S. Doc. No. 1, *supra*, at 186-187.[45]

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[43] Senator Sutherland had similarly explained, with respect to the 1922 trial of Judge Archbald, "[m]any of the Senators could not be present to hear the testimony, and of necessity they are obliged to read it before they can act. The same result, it seems to me, would be obtained by referring the case in the first instance to the Judiciary Committee to take the testimony and report it to the Senate." 49 Cong. Rec. 698 (1912).

[44] Petitioner's implication that floor attendance was satisfactory before Rule XI was adopted (Pet. Br. 10-11, 39) and that Senators who missed evidence invariably excused themselves from voting on the articles (*id.* at 11, 32) is not borne out by the historical record. See Pet. App. 50a-52a.

[45] Petitioner mistakenly suggests (Pet. Br. 13-14) that the Senate originally required the consent of the defendant to receive evidence by committee. The Senate's procedures have never required such consent. See S. Doc. No. 1, *supra*, at 186-187; 79 Cong. Rec. 8309-8310 (1935). The Senate may take into account a defendant's wishes, as perhaps it did in declining to invoke the committee procedure in Judge Ritter's 1936 impeachment trial. See 80 Cong. Rec. 3425 (Sen. Austin) (1936); *id.* at 3425-3426 (Sen. Ashurst). But

The need for Senate Impeachment Rule XI is all the more manifest today. The judiciary has nearly tripled over the past thirty years, and has grown nearly forty-fold since 1789.[46] At the same time, there has been a parallel increase in legislative demands.[47] In light of those circumstances, the Senate is entirely justified in adopting procedures that preserve the fairness and promote the efficiency of its processes.[48]

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the Senate is not required to conform its procedure to the defendant's desires. 78 Cong. Rec. 9928 (1934) ("I should think the Senate would be the judge of whether it wished to hear the witnesses in person, or to take their testimony by deposition, or in some other way.") (Sen. Robinson).

[46] Compare 28 U.S.C. 1, 44, and 133, as amended by Federal Judgeship Act of 1990, Pub. L. No. 101-650, §§ 202-203, 104 Stat. 5098-5103 (837 federal judgeships) with R. Posner, *The Federal Courts: Crisis and Reform* 357 (1985) (312 active federal judges in 1960); with The Judiciary Act of 1789, ch. 20, §§ 1-3, 1 Stat. 73, 73 (19 federal judgeships). Two other federal judges have recently been convicted of criminal offenses. See *United States* v. *Aguilar*, Cr. No. 89-365 (N.D. Cal. Nov. 1, 1990), appeal docketed, No. 90-10597 (9th Cir. Nov. 20, 1990); *United States* v. *Collins*, Cr. No. 91-035 (E.D. La. Sept. 6, 1991); appeal docketed, No. 91-3778 (5th Cir. Sept. 13, 1991).

[47] While the congressional sessions in which the first three impeachment trials were held lasted an average of 123 days, the sessions during which Claiborne, Hastings, and petitioner were tried consumed an average of 301 days. Compare *1989-1990 Congressional Directory*, S. Prt. No. 29, 101st Cong., 1st Sess. 520-521 (1989) with *id.* at 527 and 135 Cong. Rec. 1 (1989) and *id.* at D1430 (daily ed. Nov. 21, 1989). In the same period, the pages of laws that Congress enacted grew from 55 to 3,414. Compare 2 Stat. 245-346 (1803-1805) and 4 Stat. 431-494 (1830-1831) with 100 Stat. 3-4309 (1986) and 103 Stat. 3-2524 (1989).

[48] Petitioner's calculation (Pet. Br. 38) of the average interval between impeachment trials as 13 years is obviously not reflective of actual burdens on the Senate because impeachments do not space themselves neatly every 13 years. After 50 years without an impeachment, the Senate was required to conduct three trials in four years, two—including that of petitioner—in the same session of Congress. See Pet. App. 51a n.18.

3. Finally, petitioner argues that Senate Impeachment Rule XI is "inherently unfair." Pet. Br. 33. But as this Court has stated with respect to other House or Senate rules, "it is no impeachment of the rule to say that some other way would be better, more accurate or even more just." *Ballin*, 144 U.S. at 5.[49] The Senate, which has sole authority to make the substantive judgment whether petitioner has committed an impeachable offense, is the appropriate body to determine what procedures properly accommodate the interests of fairness and efficient fact-finding.[50]

If this Court nonetheless elects to undertake a more searching inquiry into the "fairness" of Rule XI, it should conclude that the procedures embodied therein amply protect petitioner's interests. Petitioner rests his

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[49] Petitioner has not contended that the Senate Impeachment Rule XI is so "unfair" as to violate due process. Nor could he. In determining what process is "due," this Court has looked "to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856). Thus, the English practice of using committees to collect evidence would be fatal to a due process challenge. See, *e.g.*, *Griffin* v. *United States*, 112 S. Ct. 466, 470 (1991).

[50] There is nothing novel in the notion that the body empowered to make substantive judgments is also entitled to determine what procedures are fair. For example, this Court has long determined appropriate procedures in original actions. See *Ohio* v. *Kentucky*, 410 U.S. at 644; *Rhode Island* v. *Massachusetts*, 39 U.S. (14 Pet.) 210, 256-257 (1840); Sup. Ct. R. 17. Similarly, this Court has long recognized that agencies have discretion to develop appropriate rules of procedure where Congress is silent on the matter. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) ("Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.").

argument of "unfairness" on generalized assertions that the "[c]redibility issues" were central to this case and that those issues could not be decided "responsibly" when only the committee actually saw and heard the witnesses. Pet. Br. 34. He attempts to demonstrate that supposed unfairness by showing a divergence between how the Senate as a whole voted and how those Senators who were members of the impeachment committee voted. Pet. Br. Apps. B, C. Neither his argument nor his statistical demonstration is persuasive.

Senate Impeachment Rule XI fully addresses petitioner's "credibility" concerns by preserving the right of the Senate to "send[] for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate." S. Doc. No. 1, *supra*, at 186-187. Petitioner had a full opportunity to raise before the full Senate the same objections concerning witness credibility that he presents here. Thus, petitioner's challenge amounts to nothing more than a quarrel about how the Senate exercised its discretion in *this* case. If the Senate is to have *any* power to conduct impeachment trials, such exercises of discretion surely should be beyond review.[51]

In any event, petitioner is incorrect in his premise that credibility issues can be resolved only by having the full Senate "see and hear" all of the testimony. Pet. Br. 34-35. Witness demeanor is scarcely the only factor relevant to credibility. Consistency in the substance of a witness's statements, for example, is also relevant. In this case, the direct inconsistency between petitioner's statements before the grand jury and his own admissions was persuasive evidence that he committed perjury. See

[51] Although petitioner had the right to request the Senate to call particular witnesses to testify in "open Senate," he pointed to no particular issues as to which the evidentiary record required elaboration and identified no specific witnesses whose testimony should be heard on the Senate floor. See 135 Cong. Rec. S14,502-S14,513 (daily ed. Nov. 1, 1989) (oral argument).

pp. 5-6, *supra*.[52] The testimony of the other witnesses, whose credibility he attacks, simply bolstered that conclusion.[53]

Petitioner's attempt to demonstrate "unfairness" by comparing the votes of Senators who serve on impeachment committees with those who do not (Pet. Br. 4-15, 33) ultimately proves nothing. Even assuming that the supposed disparity is meaningful as a matter of statistical science, there is no basis for concluding that the disparity arises from "hearing and seeing" witnesses, rather than from some other source. Members of impeachment committees are not selected to mirror the composition of the Senate as a whole. The characteristics of the committee members may differ with respect to a wide variety of salient attributes, including party affilia-

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[52] See also *Nixon*, 881 F.2d at 1313 (noting that petitioner's "perjury convictions did not depend simply upon a three-way credibility battle among Bud Holmes, [petitioner] and Fairchild" and that "the fact of the telephone discussion between Wiley and [petitioner] was acknowledged even by [petitioner]").

[53] Significantly, the full Senate had the opportunity to assess *petitioner's* credibility through his personal presentation on the Senate floor. Because the Senate deliberates in secret, most Senators' view of the case cannot be known definitively. A number of Senators who chose to explain their votes publicly, see S. Doc. No. 22, 101st Cong., 1st Sess. 443-465 (1989), nevertheless commented on petitioner's lack of credibility. For example, Minority Leader Robert Dole explained that his

> decision to convict Judge Nixon under article I, therefore, turned on an evaluation of Judge *Nixon's own credibility, and not on the credibility of * * * any other witness. I listened carefully to the remarks of Judge Nixon before the Senate.* At times, these remarks were very poignant. But unfortunately, *Judge Nixon and his words failed to have the ring of truth.*

Id. at 457 (emphasis added); accord *id.* at 453-456 (Sen. James Jeffords); *id.* at 459-465 (Sen. Frank Murkowski). Petitioner's citation to Senator Heflin's statement (Pet. Br. 34) that only the impeachment committee has "the advantage of hearing the testimony" (*ibid.*) does not aid petitioner. Senator Heflin served on the impeachment committee in petitioner's case and voted with the majority to convict petitioner on articles I and II. See J.A. 23a-24a, 26a.

tion, seniority, professional training, and region. The variation in voting patterns that petitioner cites cannot confidently be attributed to *any* particular factor.[54]

There was, in short, no unfairness in petitioner's impeachment conviction and removal from judicial office. Petitioner is doubtless disappointed in losing the position of high trust that the Constitution affords to federal judges. But the loss of his position of responsibility is not attributable to any defect in the Senate's impeachment trial procedures. Rather, it is a consequence of petitioner's own criminal conduct, which violated the public trust.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[54] In any event, more than two-thirds of those Senators who served on the petitioner's impeachment committee joined in voting to convict petitioner on Article I, and conviction on that Article alone was sufficient to remove him from office. See Pet. App. 23a n.3. Moreover, petitioner fails to explain how it would be more fair to have evidentiary proceedings before the "full" Senate, which would often mean that very few Senators would actually be in attendance, and which petitioner had conceded below would be constitutional irrespective of partial attendance. See Pet. App. 56a-57a, 84a-85a.

APPENDIX A

The Impeachment Trial Clause, U.S. Const. Art. I, § 3, Cl. 6, provides:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

The Rulemaking Clause, U.S. Const. Art. I, § 5, Cl. 2, provides:

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Senate Impeachment Rule XI, S. Doc. No. 1, 101st Cong., 1st Sess. 186-187 (1989), provides:

> That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.
>
> Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate

when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

APPENDIX B

ARTICLES OF IMPEACHMENT AS AMENDED

H. RES. 87, RECEIVED ON MAY 11, 1989.

[As amended by H. Res. 251, 101st Cong., 1st Sess.]

RESOLUTION Impeaching Walter L. Nixon, Jr., Judge of the United States District Court for the Southern District of Mississippi, of High Crimes and Misdemeanors

Resolved, That Walter L. Nixon, Jr., a judge of the United States District Court for the Southern District of Mississippi, be impeached for high crimes and misdemeanors, and that the following articles of impeachment be exhibited to the Senate:

Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against Walter L. Nixon, Jr., a judge of the United States District Court for the Southern District of Mississippi, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District of Mississippi (Hattiesburg Division) to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the criminal prosecution of Fairchild's son, Drew Fairchild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon

did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Forrest County District Attorney Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

ARTICLE II

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District of Mississippi to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the prosecution of Fairchild's son, Drew Fairchild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Judge Nixon had nothing whatsoever officially or unofficially to do with the Drew Fairchild case in Federal court or State court; and that Judge Nixon "never handled any part of it, never had a thing to do with it at all, and never talked to anyone, State or Federal, prosecutor or judge, that in any way influenced anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

ARTICLE III

By virtue of his office as a judge of the United States District Court for the Southern District of Mississippi, Judge Nixon is required to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to obey the laws of the United States.

Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts by the following:

After entering into an oil and gas investment with Wiley Fairchild, Judge Nixon conversed with Wiley Fairchild, Carroll Ingram, and Forrest County District Attorney Paul Holmes concerning the State criminal drug conspiracy prosecution of Drew Fairchild, the son of Wiley Fairchild, and thereafter concealed those conversations as follows:

(1) Judge Nixon concealed those conversations through one or more material false or misleading statements knowingly made to an attorney from the United States Department of Justice and a special agent of the Federal Bureau of Investigation during an interview of Judge Nixon conducted in Biloxi, Mississippi, on April 19, 1984. The substance of the false or misleading statements included the following:

(A) Judge Nixon never discussed with Wiley Fairchild anything about Wiley's son's case.

(B) Wiley Fairchild never brought up his son's case.

(C) At the time of the interview Judge Nixon had no knowledge of the Drew Fairchild case and did not even know Drew Fairchild existed, except for what the judge previously read in the newspaper and what he learned from the questioners in the interview.

(D) Nothing was done or nothing was ever mentioned about Wiley Fairchild's son.

(E) Judge Nixon had never heard about the Drew Fairchild case, except what he told the questioners in the interview, and certainly had nothing to do with the case.

(F) Judge Nixon had done nothing to influence the Drew Fairchild case.

(G) State prosecutor Paul Holmes never talked to Judge Nixon about the Drew Fairchild case.

(2) Judge Nixon further concealed his conversations with Wiley Fairchild, Paul Holmes, and Carroll Ingram concerning the Drew Fairchild case by knowingly giving one or more material false or misleading statements to a Federal grand jury during testimony under oath in Hattiesburg, Mississippi, on July 18, 1984. The substance of the false or misleading statements included the following:

(A) Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

(B) To the best of his knowledge and recollection, Judge Nixon did not know of any reason he would have met with Wiley

Fairchild after the Nixon-Fairchild oil and gas investment was finalized in February 1981.

(C) Judge Nixon gave the grand jury all the information that he had and that he could, and had withheld nothing during his grand jury testimony.

(D) Judge Nixon had nothing whatsoever unofficially to do with the Drew Fairchild criminal case in State court.

(E) Judge Nixon never talked to anyone, including the State prosecutor, about the Drew Fairchild case.

(F) Judge Nixon never had a thing to do with the Drew Fairchild case at all.

(G) Judge Nixon "never talked to anyone, State or Federal, prosecutor or judge, that in any way influenced anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

APPENDIX C

S. RES. 128, AGREED TO MAY 11, 1989.

[As amended by S. Res. 167, 101st Cong., 1st Sess.]

Resolved, That pursuant to rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve Senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The majority and minority leader shall each recommend six members to the Presiding Officer for appointment to the committee. The committee shall designate one of its members to be chairman and one of its members to be vice chairman.

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under rule XI.

SEC. 4. During proceedings conducted under rule XI the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the presiding officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6. (a) The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay. (b) In carrying out its powers, duties, and functions under this resolution, the committee is authorized to, in its discretion and with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable, or nonreimbursable, basis the services of personnel of any such department or agency.

SEC. 7. The Secretary shall notify the House of Representatives and counsel for Judge Walter L. Nixon, Jr., of this resolution.

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No. 91-740

IN THE

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Respondents.

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to the United States Court of Appeals
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REPLY BRIEF OF PETITIONER

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IN THE

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UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

SUMMARY OF ARGUMENT

Petitioner's claim may be stated simply: a hearing by a committee of twelve senators does not meet the express constitutional requirement that the Senate "try all Impeachments." U.S. Const., Art. I, § 3, cl. 6. Petitioner is entitled to a judicial determination of this claim.

Respondents and amicus curiae United States Senate [collectively, "respondents"] attempt to trivialize this claim as one concerning mere "evidence-gathering techniques," not a constitutional right central to the separation of powers. Brief for the Respondents and Amicus Curiae United States Senate 39; *accord*, *id.*, at 12, 18, 23, 26, 27 n.25, 29 [hereinafter "Resp. Br."]. But the essence of a "trial" is the "gathering of evidence." The Framers conferred on the Senate the "sole Power to try all Impeachments" because they wanted the "evidence gathering" to take place before that "numerous"

body, even though the effort would be more arduous than "would consist with a reasonable attention to economy."

This conclusion is powerfully reinforced by the historical evidence: the Framers' deliberations, the impeachment practices of the states, and the Senate's own procedures for its first 150 years. Respondents' historical argument skims over that evidence while trumpeting two peripheral points: a sentence written by Thomas Jefferson in 1797 and supposed procedures of the House of Lords in the 1620s. Those historical shards constitute no material evidence at all.

Respondents' justiciability argument also is unsuccessful. Article III extends judicial review to questions arising under the Constitution. That review is particularly important in cases presenting confrontations between coordinate branches of government.

Respondents acknowledge the need for judicial review of a claim based on an "express limitation" in the impeachment clause.[1] They thus wisely distance themselves from the extreme position that judicial review is unavailable even for violations of limitations such as the requirement of a two-thirds majority vote for conviction. *See* Pet. App. A, at 15a (Williams, J.). Respondents' refusal to take such an extreme position is dictated by this Court's holdings, dating from *Marbury v. Madison*, that the separation of powers requires judicial review of a case that "turns on the proper interpretation of the relevant constitutional provisions." *United States Dep't of Commerce v. Montana*, 112 S. Ct. 1415, 1416 (1992).

Because respondents have agreed that a violation of the express limitations of the impeachment clause is reviewable,

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[1] Resp. Br. 26 n.25; Opposition to Petition for Writ of Certiorari 9, 13; *accord* Brief of the Washington Legal Foundation, Congressman James F. Sensenbrenner, Congressman George W. Gekas, and the Allied Educational Foundation as *Amicus Curiae* in Support of Respondents 15 (citing *United States v. Ballin*, 144 U.S. 1, 5 (1892)) [hereinafter "Amici Br."].

justiciability turns on whether a committee hearing violates that text. *See Montana*, 112 S. Ct. at 1416; *INS v. Chadha*, 462 U.S. 919, 940-41 (1983); *Powell v. McCormack*, 395 U.S. 486, 548 (1969). We first address the substantive constitutional issue, and second, justiciability.

ARGUMENT

I. THE CONSTITUTIONAL TEXT AND THE FRAMERS' INTENT

In contending that the constitutional text does not require the Senate to try all impeachments, respondents offer a strained textual construction while largely ignoring the principal historical evidence.

A. The Text Requires Impeachment Trial By The Senate

Respondents admit that the Constitution directs the Senate to act in a "judicial character as a court." *The Federalist* No. 65, at 426 (B. Wright ed. 1961) (A. Hamilton); *see also* Brief of Petitioner 9, 11-12 [hereinafter "Pet. Br."]. Thus, "the Senate" shall "try" all impeachments; each senator, when "sitting" for that purpose, is under oath or affirmation; the accused may not be "convicted" without a two-thirds vote of the senators "present," and may be convicted only for "high Crimes and Misdemeanors"; and the Chief Justice "presides" at presidential impeachments. As respondents concede, "the Framers' expectation that impeachment trials would bear some similarity to judicial trials" is further confirmed by Article III's provision that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." Resp. Br. 32 n.32. Respondents contend, however, that the Senate's mandate to "try" impeachments contains no limitation on "how evidence shall be taken." Resp. Br. 12. For them, the term "try" does not restrict the Senate's power to delegate to another body all of the "evidence gathering tasks," which respondents describe as playing a "limited role" in the trial. *Id.*, at 29, 38.

The distinction between the "trial" and the taking of evidence is both artificial and totally without support in the Constitution. The "taking" of evidence is the core of any trial. Denied that function, the "trier" becomes a mere reviewer of the record. To say that the Senate may "try" an impeachment without taking the evidence is to make nonsense of the impeachment trial clause. By that reasoning the Chief Justice could "preside" over presidential impeachments from his chambers in the Supreme Court building simply by sending his executive assistant to occupy the Senate president's chair.

Strikingly, Rule XI acknowledges that the "taking of evidence" is the essence of the "trial": "[N]othing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate *having the entire trial in open Senate*." Pet. Br., App. A, at A2 (emphasis added). Under Rule XI, Nixon's "entire trial" took place before the Rule XI committee.[2]

Respondents attack a straw man when they argue that impeachment trials need not "conform exactly" to court procedure. We challenge the trial before a Rule XI committee, not the evidentiary procedures used by that committee.[3]

Although respondents thus argue that impeachment trials are different from courtroom proceedings, they simultaneously

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[2] Echoing statements by the Senate in this litigation, amici suggest that the Senate could take "congressional notice" of the outcome of prior criminal litigation and dispense entirely with the need for a trial before the Senate. Amici Br. 22 n.3; *see* Pet. Br. 39-40 (citing Senate position). The Senate and amici thus would permit politically motivated criminal prosecutions automatically to achieve removal of the accused from office, contravening the Framers' intent to ensure the "double security" of "a double trial." *The Federalist* No. 65, at 428; *see* Pet. Br. 37.

[3] Notably, respondents appear to take the position that the due process clause governs impeachment trials. Resp. Br. 43 n.49. If so, that clause presumably would constrain any trial procedures used by the Senate.

compare Rule XI committees to special masters who take evidence in civil actions. The analogy does not hold. Under the Seventh Amendment, proceedings before a master are no substitute for a jury trial. The master's findings are simply "admissible as evidence" and "may be read to the jury." Fed. R. Civ. P. 53(e)(3). Thus, the use of masters does not disturb the constitutional right to a jury trial because the parties "remain as free to call, examine, and cross-examine witnesses as if the [master's] report had not been made." *In re Peterson*, 253 U.S. 300, 310-11 (1920).[4] Similarly, magistrates are not authorized to serve as substitutes for juries, or be the sole recipients of evidence in cases for which juries are otherwise required. *See* 28 U.S.C. § 636 (b)(1) (magistrates may conduct hearings on pretrial motions); *id.* §§ 636(a)(3), 636(c) (magistrates may try civil cases and certain misdemeanors, but only with parties' consent); *cf. Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 61-64 (1989) (jury trial required by Seventh Amendment in bankruptcy dispute).[5]

Respondents also argue that the impeachment clause allows the Senate to "judge" guilt or innocence without having seen and heard the evidence, much as each House may "judge" the elections and the qualifications of its members. Art. I, § 5,

---

[4] *See also* U.S. Const. amend. VI (guaranteeing that "the accused shall be confronted with the witnesses against him" in a jury trial). In addition, courts have held that issues turning on witness credibility and allegations of fraud are inappropriate for referral to a master. *See, e.g., Bradshaw v. Thompson*, 454 F.2d 75, 80 (6th Cir.), *cert. denied*, 409 U.S. 878 (1972); *In re Watkins*, 271 F.2d 771, 775 (5th Cir. 1959); *see also Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 & n.18 (1962).

[5] The use of masters in original actions before this Court also is inapposite. Resp. Br. 31. Unlike the impeachment trial clause, Article III does not direct this Court to "try" original proceedings, but simply grants original jurisdiction over certain matters. In any event, jury trial would not apply to actions between states or between a state and a citizen seeking equitable relief. *See United States v. Louisiana*, 339 U.S. 699, 706 (1950); *cf.* 28 U.S.C. § 1872 (jury trial specified by Congress in certain original cases).

cl. 1. But the constitutional text refutes this contention. By choosing different words, the Framers distinguished between Congress's function as "judge" of members' elections and qualifications, and the Senate's duty to "try" impeachments. Had the Framers intended the Senate merely to "judge" or "vote" on articles of impeachment, they would have said so.[6]

Respondents finally make the extraordinary statement that Rule XI must be sustained in "[t]he absence of any textual prohibition on the Senate's use of a committee to receive evidence." Resp. Br. 32. By this reasoning, no allocation of a power could be enforced unless the Constitution also specifically prohibited any alternative allocation. Thus, the Seventh Amendment jury trial right would be unenforceable because the Constitution does not prohibit trial by combat; and the House of Representatives would not have exclusive power to initiate revenue bills because the text does not prohibit the Senate from doing so. This novel approach to constitutional interpretation is untenable.

B. The Historical Evidence Overwhelmingly Establishes That The Senate Must Try The Case

Respondents do not dispute the central historical evidence of the Framers' intent:

- That the Framers intended to ensure a deliberative trial to decide whether "to doom to honor or to infamy the most confidential and the most distinguished characters of the community." *The Federalist* No. 65, at 428.

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[6] While the Framers lived, the Senate never used a committee to take evidence in an impeachment trial, but it referred numerous election and expulsion disputes to committees for fact finding. *See Senate Election, Expulsion and Censure Cases from 1789 to 1960*, S. Doc. No. 71, 87th Cong., 2d Sess. (1962). Thus, the Framers and their contemporaries understood that the Senate itself must try impeachments, but that the duty to "judge" under the elections clause requires only that the Senate "make an independent final judgment." *See Roudebush v. Hartke*, 405 U.S. 15, 25 (1972).

- That the Framers rejected streamlined methods such as judicial removal by "address" in favor of impeachment trials of a "judicial character" which provide a "real demonstration of innocence or guilt" on specific charges of wrongdoing. *Id.*, at 426-27.
- That the Senate was chosen to try impeachments because it was a "tribunal more numerous than would consist with a reasonable attention to economy," and would possess the "degree of credit and authority" necessary to resolve impeachment charges brought by the House, the people's "immediate representatives." *Id.*, at 426-28, 430; *The Federalist* No. 79, at 498 (A. Hamilton).
- That the Framers knew state impeachment practices and intended the federal provisions to follow the states' practices, which never included evidentiary committees. *See* Pet. Br. 3-4 & n.1, 7-8 & n.3.
- That the first generation of senators, and all succeeding ones until 1986, insisted that the Senate conduct impeachment trials itself. *See* Pet. Br. 31-32.[7]

Acknowledging this central evidence of the Framers' intent, respondents rummage for support through some dusty corners of history. Respondents concede that English impeachment trials in the House of Lords appear *not* to have involved the use of committees "during the Framers' era." Resp. Br. 35. At least a half dozen English impeachments occurred in the period 1700-1780, and no evidence suggests the use of committees in any of them. *See* 4 J. Hatsell, *Precedents of Proceedings in the House of Commons* 299-314 (1818); Williams, *The*

[7] The first three impeachments, in which Framers participated, are particularly significant. In addition to the seven Framers previously identified as participating in those three impeachments, Pet. Br. 31-32 & n.30, Framers George Read and Gunning Bedford were witnesses in the 1805 trial of Justice Chase. W. Rehnquist, *Grand Inquests, the Historic Impeachments of Justice Samuel Chase and President Andrew Jackson* 91-92 (1992).

Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials, 50 N.Y.U. L. Rev. 512, 531-32 (1975).

Nevertheless, respondents point hopefully to cloudy records suggesting the use of committees in four English impeachments in the 1620s: Field, Bacon, and Mompesson in 1620, and Cranfield in 1624. But the evidence from those impeachments is inconclusive, at best. A leading scholar has concluded that Field's impeachment trial did not involve a committee. *See* C. Tite, *Impeachment and Parliamentary Judicature in Early Stuart England* 226-27 (1974). Mompesson fled before trial and was tried *in absentia* in a proceeding that appears not to have been an impeachment at all. E. Foster, *The House of Lords* 154 (1983).

In Bacon's case, the full House heard evidence: "Witnesses were sworn in the House [of Lords] and examined both in committee *and in the House itself*." *Id.*, at 155 (emphasis added). Bacon thereafter confessed, which "obviated the need for the Lords to use the committee's evidence." Williams, *supra*, at 529. Finally, Cranfield endured a five-day trial before the Lords, "often calling witnesses in his own defence." Tite, *supra*, at 165. In short, there is no confirmed example of an impeachment trial in which the House of Lords delegated the trial to a committee.[8]

Moreover, as respondents now appear to concede, there is no evidence that any of the Framers knew of these ancient and inconclusive precedents. No Framer ever mentioned those supposed precedents or the idea of impeachment trial by com-

[8] To the extent committees were used by the Lords in these cases, they appear to have aided chiefly in investigating allegations and drawing up charges, not in trying the accused. *See, e.g.*, Foster, *supra*, at 153-61 (1983); Tite, *supra*, at 172. In other impeachments during this period, and in all impeachments after 1626, the Lords made no apparent use of committees. *See* Foster, *supra*, at 156-57, 167-72 (1983) (Bennet in 1621 and Strafford in 1640); Tite, *supra*, at 226-27 (Bristol in 1626).

mittee. Nevertheless, respondents suggest gently that such knowledge was "likely," Resp. Br. 35 n.36, because the Framers supposedly could have learned of the early English trials from a well known volume, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors*. *See* Williams, *supra* at 530-31; Resp. Br. 34 n.35. But the editions of that work available to the Framers -- published in 1719, 1730, 1742, and 1776 -- contain no reference to the Field, Mompesson, and Cranfield trials.[9] Only a later edition, published in 1809 and cited anachronistically by respondents, discussed those three cases.[10] It thus remains unclear just how the Framers would have learned this supposed information, which they never mentioned.

Respondents seek to shore up their position by stressing Thomas Jefferson's reference, in his *Manual of Parliamentary Procedure*, to the Lords' early use of committees. Because Jefferson made that reference in 1797, they suggest, his "contemporaries" attending the Philadelphia Convention a decade earlier must have had the same knowledge. Resp. Br. 37. This is most implausible.[11] Jefferson was an exceptionally well read man whose extensive library helped to establish the Library of

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[9] *See A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors* (Hargrave ed. 4th ed. 1776); *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors* (S. Emlyn ed. 3d ed. 1742); *A Complete Collection of State-Trials and Proceedings for High Treason and other Crimes and Misdemeanors* (S. Emlyn ed. 2d ed. 1730); *A Compleat Collection of State-Tryals and Proceedings upon Impeachments for High Treason and other Crimes and Misdemeanors* (Salmon ed. 1st ed. 1719).

[10] 2 *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors* 1116, 1122-23, 1183 (T. Howell ed. 5th ed. 1809).

[11] Jefferson himself may not have become aware of the Lord's use of committees *until* 1797. *See Jefferson's Parliamentary Writings* 43-44 (W. Howell ed. 1988) (impeachment passages likely not added to Jefferson's

Congress.[12] His views of English impeachment practices cannot facilely be "imputed" to the Framers.[13]

In any event, the weight of Jefferson's observation approaches the vanishing point when placed in the context of the Senate's actions during Jefferson's term as Vice-President, when he composed the Manual. As respondents note, the Senate used a committee to take evidence in the 1797 proceeding to expel Sen. William Blount from that body. Resp. Br. 30 n.29; *Senate Election, Expulsion and Censure Cases from 1789 to 1960*, S. Doc. No. 71, 87th Cong., 2d Sess. 3 (1962). As respondents also note, Jefferson had completed the portion of

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Manual until late 1797). Indeed, when Jefferson was preparing to assume the vice presidency in 1797, he wrote to George Wythe of Virginia asking for information on parliamentary practice: "It is now so long since I have acted in the legislative line, that I am entirely rusty in the Parliamentary rules of procedure." IX *Writings of Thomas Jefferson* 370 (A. Lipscomb ed. 1903).

[12] *See generally Thomas Jefferson's Library* (J. Gilreath and D. Wilson eds. 1989).

[13] The lone source cited in Jefferson's Manual for the Lords' use of impeachment committees was Selden's *Judicature of Parliament*. Yet John Adams commented that in 1774 he had the only copy in Boston, or even in America, of that work. Adams also noted Americans' general ignorance of English impeachment precedents. 10 *Works of John Adams* 237-39 (C.F. Adams ed. 1856). Such evidence has led historians to conclude that while the concept of impeachment was born in England, American impeachment practices developed largely independently of the English precedents. *See, e.g.*, P. Hoffer & N. Hull, *Impeachment in America, 1615-1805*, 96-97 (1984).

In fact, during the first federal impeachments, the Americans often criticized those elements of English impeachment procedure of which they had learned. Sen. Jacob Read of South Carolina insisted "that there was no resemblance between the Senate and the House of Lords" in impeachment matters, Aurora General Advertiser, Mar. 1, 1798, p. 2, col. 3, while Sen. Blount's counsel, Framer Jared Ingersoll, found in English impeachment law "little good, and much ill." *Proceedings on the Impeachment of William Blount* 59-62, 67 (J. Gales ed. 1799); *see also* Pet. Br. 5 (Framers' rejection of English method of removing judges by "address").

his Manual that mentions the Lords' use of committees "by the time of the Blount impeachment in 1798 and provided a copy to the Senate committee charged to study procedures for the Blount trial." Resp. Br. 36 n.37. Yet despite the Senate's use of a committee in expelling Blount, and despite Jefferson's historical reference to impeachment committees, the Senate did not propose to use a committee to take evidence in Blount's impeachment trial.

Rather, the committee reviewing procedures for Blount's trial proposed "that the Senate form itself into a Court of Impeachment, by taking the oath prescribed." 8 Annals of Cong. 2196 (1798). The Senate adopted the committee's report and "formed itself into a High Court of Impeachment, *in the manner directed by the Constitution*, and the oath prescribed was administered to the Senators present." *Id.* at 2245 (emphasis added). For the Pickering impeachment in 1803 and the Chase proceeding in 1805, the Senate followed this practice and conducted the trial itself. Thus, the Senate in its earliest days -- and through all impeachment trials during the next century and a half -- believed that trial by the Senate, on the Senate floor, was "the manner directed by the Constitution."

C. Respondents' Factual Rationales For Rule XI Are Unavailing

Respondents offer two fact-based defenses for Rule XI: (i) that this Court should conclude that, based on the evidence, the Senate properly convicted Nixon, and (ii) that the Senate is too busy to spend four days hearing the evidence against Nixon. Neither rationale has any force.

Respondents assert that Nixon's own testimony "was persuasive evidence that he committed perjury." Resp. Br. 44. Because Nixon argued on his own behalf for thirty minutes, respondents add, the conviction also may be sustained. Respondents thus perversely invite this Court to review the sufficiency of the evidence against Nixon, while simultaneously arguing that Nixon's claim is non-justiciable.

Nixon's argument to the Senate was just that -- argument. He did not testify regarding the facts at issue, nor did the Senate hear from Nixon's accusers (a convicted perjurer and an admitted perjurer) regarding those facts. As the Rule XI committee concluded, proper resolution of the charges against Nixon depended on knowledge of the "specific details" of the conversations about which Nixon was alleged to have lied.[14] Closing argument is no substitute for the testimony of all witnesses, including the accusers.[15]

In addition, respondents continue to plead expediency in defense of Rule XI. They do not address, however, the Framers' clear intent that impeachment trials *not* be "consistent with a reasonable attention to economy." Respondents also make no response to this Court's admonition that considerations of "convenience and efficiency" will not save a given law or procedure "if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983). As this Court recently reaffirmed in *New York v. United States*, 60 U.S.L.W. 4603, 4615 (U.S. June 19, 1992):

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[14] *Report of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.*, S. Rep. No. 164, 101st Cong., 1st Sess. 18-19 (1989).

[15] Respondents also assert, contrary to centuries of experience, that credibility determinations can be reached without observing "witness demeanor." Resp. Br.44; *cf.* Pet. Br. 14 n.13, 18-19, 34-35 (witness demeanor critical to credibility determination). As the Chief Justice recently observed concerning the Chase impeachment trial (Rehnquist, *supra*, at 68):

> [A] mere record of questions and answers tells us nothing about what courts call the "demeanor" of the witness -- the expression on his face, his attitude, his intonation, and similar things that the senators sitting in judgment were able to view firsthand. It is the difference between reading a letter from someone and talking to the person face-to-face; the words used in the conversation may be the same as the ones used in the letter, but because one is able to see the person with whom one is conversing, the conversation may give an entirely different impression from the letter.

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

Respondents' expediency rationale not only is irrelevant, but also rings hollow. Respondents allege an "increase in legislative demands" since 1789. Resp. Br. 42. Prior Senates, however, managed to fulfill their constitutional obligation to try impeachments despite pressing legislative agendas. Pet. Br. 10 & n.4, 12.[16]

In fact, the Senate convened for only 136 days in 1989, or about 11 days per month.[17] Eight of those "working days" were pro forma sessions lasting less than a minute,[18] while two others

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[16] In contrast, 87 of the 240 public laws enacted in 1989, when both the Nixon and Hastings impeachments came before the Senate, were "commemorative" acts, *see* Stathis & Schwemle, *Commemorative Legislation* 1, 17 (Cong. Research Serv. Report, Jan. 2, 1991), including the proclamation of National Tap Dance Day, Country Music Month, and National Day to Commemorate the Bastille Day Bicentennial. 103 Stat. 148, 774, 838 (1989).

[17] 136 Cong. Rec. D1 (daily ed. Jan 23, 1990).

[18] 135 Cong. Rec. S805 (daily ed. Jan. 27, 1989) (4 seconds); *id.*, D53 (daily ed. Feb. 3, 1989)(1.06 seconds); *id.*, D86 (daily ed. Feb. 21, 1989)(1 second); *id.*, S1755 (daily ed. Feb. 27, 1989)(0.6 seconds); *id.*, S2531 (daily ed. March 13, 1989)(9.5 seconds); *id.*, S4945 (daily ed. May 5, 1989)(0.53 seconds); *id.*, S6485 (daily ed. June 12, 1989)(26 seconds); *id.*, D967 (daily ed. Sept. 8, 1989)(30 seconds).

took less than an hour.[19] The Senate in 1989 took seven recesses, each lasting between ten and 30 days.[20] Thus, although the congressional session may have extended for 301 days, as respondents contend, Resp. Br. 42 n.47, there were at least seven periods during which the Senate could have heard the four-day Nixon trial and still been able to recess for the next six days.[21]

II. PETITIONER'S CLAIM IS JUSTICIABLE

Respondents concede that *Powell*, *Montana*, and other decisions of this Court confirm the justiciability of a claim that one of the express limitations of the impeachment clause has been transgressed. The need for judicial review is heightened here because an impeachment trial directly concerns the power of Congress over the executive and judicial branches. Nevertheless, respondents offer a variety of flawed arguments against

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[19] 135 Cong. Rec. D20 (daily ed. Jan. 20, 1989) (11 minutes); *id.*, at D317 (daily ed. April 10, 1989) (48 minutes).

[20] *See* 135 Cong. Rec. S7 (daily ed. Jan. 3, 1989) (recess from January 4 until January 19, 1989); *id.*, D78 (daily ed. Feb. 9, 1989) (recess from February 10, 1989 until February 20, 1989); *id.*, D238 (daily ed. March 17, 1989)(recess from March 18 until April 3, 1989); *id.*, D378 (daily ed. April 19, 1989) (recess from April 20 until April 30, 1989); *id.*, D525 (daily ed. May 18, 1989)(recess from May 19 until May 30, 1989); *id.*, D712 (daily ed. June 23, 1989) (recess from June 24 until July 10, 1989); *id.*, D937 (daily ed. Aug. 4, 1989) (recess from August 6, 1989 until September 5, 1989).

[21] Respondents repeat their peculiar warning that, if the Senate must try impeachments, "actual attendance may be less than the attendance in committee and the composition of the group [will be] 'constantly changing.'" Resp. Br. 41 (quoting Pet. App. 51a-52a). But respondents do not contest that the quorum requirement applies to impeachment proceedings on the floor of the Senate, and thus establishes a minimum attendance requirement of a majority of members. In this regard, Amici Washington Legal Foundation, et al., erroneously contend that, in the court below, Nixon conceded the constitutionality of a trial on the Senate floor attended only by 12 senators. *See* Amici Br. 5-6. No such concession was made. *See* Transcript of Oral Argument 10 (Mar. 14, 1991).

judicial review. In this case, justiciability turns solely on whether Rule XI violates an "express limitation" of the Constitution.

A. Characterizing The Impeachment Clause As A "Grant Of Authority" Does Not Advance The Analysis

Respondents begin with the pronouncement that the Senate's "sole Power to try all Impeachments" constitutes "a grant of authority, not a limitation on its exercise." Resp. Br. 12, 17. The significance of this statement is elusive. If, as we have shown, the text requires the Senate and not a committee of twelve senators to try all impeachments, the power to try impeachments carries an inherent "limitation on its exercise."

Every constitutional "grant of authority" that designates a procedure for its exercise also serves as a "limitation on its exercise." For example, the Constitution grants legislative authority to Congress, and prescribes certain procedures for its exercise. *Chadha*, 462 U.S. at 958-59. Although there is no express prohibition against exercising that authority by other means, neither house may do so, even if an alternative route might be a "convenient shortcut" or provide relief from "governmental processes that often seem clumsy, inefficient, even unworkable." *Id.* *See Bowsher v. Synar*, 478 U.S. 714, 733-34, 736 (1986); *Buckley v. Valeo*, 424 U.S. 1, 125-35 (1976); *Powell v. McCormack*, 395 U.S. 486, 550 (1969); *see also New York v. United States*, 60 U.S.L.W. at 4611-12. Equally, the grant of "judicial power" in Article III bars the courts from exercising other powers. *Lujan v. Defenders of Wildlife*, 60 U.S.L.W. 4495, 4496-97, 4501 (U.S. June 12, 1992).

Respondents also claim reliance on the rulemaking clause in Article I, but exercise of that plenary power is subject to judicial review when Congress "ignores constitutional restraints or violate[s] fundamental rights." *United States v.*

Ballin, 144 U.S. 1, 5 (1892); *see Morgan v. United States*, 801 F.2d 445, 451 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 911 (1987).

B. Respondents' Construction Of "Sole Power" Is Misguided

Respondents continue to assert that the grant to the Senate of "sole power" to try impeachments precludes judicial review. Noting that the impeachment trial clause is the only constitutional provision that confers a "sole" power, respondents contend that the phrase must be construed to "give the Senate sole power to determine the structure of the proceedings and to resolve procedural issues." Resp. Br. 17-18.

The Constitution gives the Senate the "sole Power to *try* all Impeachments," thereby excluding trial of impeachments in the courts. Yet the clause cannot be read to grant the Senate the sole power to decide whether it has complied with that clause. Article III confides that power in the courts. If "sole power" meant what respondents say, the Senate also would have exclusive authority over whether any of the other "express limitations" on the impeachment trial power were violated, such as the requirement of a two-thirds majority vote for conviction. Yet even respondents acknowledge that judicial review is available for such violations.

The absence of an express provision for judicial review of impeachments is not significant. Article III extends the judicial power to *all* cases arising under the Constitution, and the impeachment clause does not negate that provision. By contrast, when the Framers wished to prohibit presidential pardons for those convicted after impeachment trials, they unmistakably stated that prohibition in Article II, section 2, clause 1. The absence of such a prohibition in Article III demonstrates the need for judicial review here, since there is no "textually demonstrable commitment" to the Senate of constitutional impeachment issues.

Respondents have identified nothing in the debates over the Constitution or its drafting history to support their view of

justiciability. Prior drafts of the impeachment trial clause referred only to the Senate's "power" to try impeachments; no special emphasis or distinction was accorded the word "sole" when it was added to clarify that the Senate -- and not the courts -- would "try" and "convict" in impeachment "cases." Indeed, the word "sole" was added by the Committee of Style, which "'had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so.'" *Powell*, 395 U.S. at 538-39 (quoting C. Warren, The Making of the Constitution 422 n.1 (1928)).[22]

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[22] Despite respondents' suggestions to the contrary, *see* Resp. Br. 25, the Framers did not intend changes by the Committee of Style to alter the meaning of the Constitution as previously approved by the Convention. *See, e.g.*, M. Farrand, *The Framing of the Constitution* 181-83 (1913) (member of Committee of Style allegedly altered punctuation in Art. I, § 8, cl. 1 to convert general welfare clause into independent congressional power, but another delegate directed correction to conform to Convention proceedings); 2 *Records of the Federal Convention of 1787* 607 (M. Farrand ed. 1966) [hereinafter "Farrand"] ("The Report from the Committee of stile and arrangement, was taken up, in order to be compared with the articles of the plan as agreed to by the House & referred to the Committee . . . .").

The drafting of the contracts clause in Article I, section 10, does not undermine this conclusion. That provision was first offered by Rufus King on August 28, 1787. *See* 2 Farrand 439.The ensuing debate reflected agreement with the principle that the States should be barred from imposing "retrospective" restrictions on private contracts. *Id.* at 440. Instead of adopting the King proposal, however, the delegates agreed that their concerns were met by a bar against "retrospective ex post facto laws." *Id.*; *see also* 1 *1787 Drafting the U.S. Constitution* 1084 (W. Benton ed. 1986). Yet the next day John Dickinson reported that, "on examining Blackstone's Commentaries, he found that the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that *some further provision for this purpose would be requisite*." 2 Farrand 448-49 (emphasis added). The Committee of Style then substituted language based on the original Rufus King proposal, thereby effecting the intent of the Framers. *Id.* at 597. *See also* 3 Farrand 99-100 (September 1787 letter from Convention delegates Roger Sherman and Oliver Ellsworth).

C. Because Impeachment Concerns Confrontations Between Branches, The Need For Judicial Review Is Heightened

Respondents argue that the principle of separation of powers bars this Court from intruding on the Senate's conduct of its internal affairs. The holding of *Powell v. McCormack* undercuts this argument entirely. Moreover, this case does not concern only the Senate's ordering of its own affairs. Through Rule XI, the Senate has denied the constitutional rights of an individual officer of a coordinate branch. When one branch so exceeds its powers, violates an express command of the Constitution, and degrades the independence of another branch, judicial review is essential.

This Court has not shrunk from determining the constitutional limits on the powers of other branches. *See* cases cited at Pet. Br. 47. Respondents object that judicial review here would "place ultimate control over the impeachment process in the *same* body that the impeachment process was intended to regulate." Resp. Br. 27. But this supposed circularity is neither real nor a barrier to judicial review.

First, courts often review legislation affecting the institutional prerogatives of the judiciary. *See, e.g., Mistretta v. United States*, 488 U.S. 361 (1989) (judicial commission to promulgate sentencing guidelines); *Morrison v. Olson*, 487 U.S. 654 (1988) (judicial appointment of special prosecutors); *United States v. Will*, 449 U.S. 200 (1980) (judicial salaries). And, as in petitioner's case, they are routinely responsible for conducting criminal proceedings undertaken against members of the judiciary. Thus, courts are not institutionally disabled from construing the impeachment clause any more than legislative self-interest bars Congress from regulating its membership, or setting its own salaries.

Moreover, impeachment does not apply only to judges, but also applies to executive officers like President Johnson and Secretary of War Belknap. Judicial review of constitutional

issues in such executive impeachments would not present the supposed circularity that respondents decry. Yet neither the Constitution nor logic support having judicial review turn on whether the accused is a cabinet member or a judge.

Respondents also cannot explain why court review of the issue presented here would thwart the Framers' intent while review of other constitutional issues surrounding impeachments, such as the two-thirds majority requirement, would not. As in *Powell*, if a constitutional limitation has been violated here, the case is justiciable. *See Powell*, 395 U.S. at 547-50.

At bottom, respondents propose to construe the Senate's sole power to try impeachments to include the sole power to interpret the constitutional provisions that govern that power. Such an expansion exemplifies "the particular danger of the Legislative Branch's accreting to itself judicial . . . power" which the Framers feared. *Mistretta*, 488 U.S. at 382; *see The Federalist* No. 78, at 492 (A. Hamilton). This accretion is particularly threatening when the power involved enables the Senate to remove an officer of another branch and permanently disqualify him from future office. *See* Art. I, § 3, cl. 7. Judicial review must be available to ensure that such ultimate power is exercised in the manner prescribed by the Constitution.

D. This Case Presents No "Unsettling" Question of Relief

Although petitioner seeks only a declaratory judgment, respondents contend that judicial resolution of his claim lacks "finality" and may have "unsettling" consequences. Resp. Br. 28 n.27. Even if that assertion were true, it is irrelevant.[23] When courts determine constitutional rights and the boundaries of a coordinate branch's power, the consequences may be

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[23] If judgment were granted in petitioner's favor, it would be up to Congress to decide whether to impeach and retry him or to seek some other resolution of this matter. Under the Declaratory Judgment Act, this case presents no difficult remedial issues.

"unsettling" in some sense. Yet judicial review is not withheld for that reason.[24]

Petitioner does not challenge any judgment entered by the Senate or the Senate's power to try him, he challenges the Senate's attempt to avoid trying the impeachment at all. "The plenary authority of Congress . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." *Chadha*, 462 U.S. at 940-41.

CONCLUSION

For all the foregoing reasons, petitioner has a constitutional right to trial by the Senate, and this Court should determine that right. The decision below should be reversed and declaratory judgment should be entered in favor of petitioner.

Respectfully submitted,

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[24] For example, the Court's ruling in *Chadha* nullified nearly 200 statutory provisions dating back a half-century. *Chadha*, 462 U.S. at 944-45.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WALTER L. NIXON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-740

WALTER L. NIXON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITIONER

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This case raises the question of whether a Senate impeachment trial violated the Constitution because a Senate committee conducted virtually all aspects of the trial, with the full Senate participating in only the final deliberations and vote. Petitioner argues that the Constitution requires the full Senate to conduct an impeachment trial, based on the command that the Senate shall "try" all impeachments. Art. I, § 3, cl. 6. Respondents and the United States Senate (collectively referred to as respondents) argue first that the Constitution's commitment to the Senate of "the sole power to try all impeachments" renders a challenge to

the Senate's trial procedures nonjusticiable, and second, that the Senate is not constitutionally precluded from using its committee procedure. Both the district court and two court of appeals judges concluded that this case presents a nonjusticiable controversy. App. B at 58a to Petition for Certiorari; App. A at 1a and 16a (Williams, J., & Randolph, J.); *but see id.* at 18a (Edwards, J., dissenting).

Public Citizen files this brief as *amicus curiae* to respond only to the contention that this case is not justiciable; it does not address the issue of whether the proceeding conducted by the Senate meets the requirements of the Constitution. Public Citizen regularly litigates cases that challenge governmental actions on the grounds that they violate the Constitution or applicable statutes. In many of these cases, the government has argued that the case presents a nonjusticiable political question. For example, this defense was raised in a case in which Public Citizen attorneys represented more than one hundred Members of Congress challenging the stationing of troops in the Persian Gulf without compliance with the War Powers Act. *Lowry v. Reagan*, 676 F. Supp. 333, 339-40 (D.D.C. 1987), *appeal dismissed in unpublished order*, No. 87-5426 (D.C. Cir. Oct. 17, 1988). Most recently, the government has contended that the issue of whether environmental impact statements must be prepared on international trade agreements is a political question, in part, because it asserts that the negotiation of trade agreements is textually committed by the Constitution to the President. *Public Citizen v. Office of the U.S. Trade Representative*, No. 92-5010 (D.C. Cir. argument scheduled May 4, 1992). As an outgrowth of its own litigation over the political question doctrine, Public Citizen has an interest in ensuring that this doctrine is confined to those rare instances that truly present issues that are beyond the province of the courts.[1]

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[1] Counsel for the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

SUMMARY OF ARGUMENT

The political question doctrine is often invoked by parties in litigation to prevent the courts from conducting one type of inquiry for which they are well-suited -- deciding whether particular constitutional provisions constrain the Legislative or Executive Branches. In such cases, of which this is an example, the government contends that the matter is textually committed by the Constitution to one of the political branches, and that a judicial ruling would express lack of respect due that branch of government.

The first inquiry -- whether the Constitution contains a demonstrable textual commitment that entirely ousts the courts -- is clearly justiciable. After all, it is the province of the courts to interpret the Constitution and to say what the law is, *i.e.*, whether the Constitution gives one of the political branches unreviewable discretion in a particular area.

The second basis for invoking the political question doctrine -- that a judicial decision will express disrespect for another branch -- rises or falls with the first. If a power is committed by the Constitution to the Legislative or Executive Branch to the exclusion of the courts, then the courts have no role in passing on the question, and hence no opportunity to express a lack of respect. On the other hand, if there is no exclusive textual constitutional commitment of the power at issue, then the courts have a role, and they are not precluded from adjudicating the dispute simply because others might consider a decision that is adverse to one of the political branches to express a lack of respect for that branch.

ARGUMENT

I. DECIDING WHETHER CONSTITUTIONALLY COMMITTED POWERS HAVE JUDICIALLY ENFORCEABLE LIMITATIONS IS NOT BARRED BY THE POLITICAL QUESTION DOCTRINE.

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), this Court reviewed the history of the political question doctrine and con-

cluded that the political question doctrine comes into play only when one of certain factors is prominent. The Court's listing included the two factors invoked by respondents in this case: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department," and (2) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." 369 U.S. at 217.

Before explaining why neither of these factors makes this case nonjusticiable, it is important to stress that this case does not involve the part of the political question doctrine that precludes adjudication of issues where judicially manageable standards are lacking. Indeed, this case presents legal issues that the courts are not only well-equipped to decide, but that they regularly decide: whether a trial -- criminal, civil, or administrative -- comports with what is constitutionally required for that kind of proceeding. Thus, respondents have never contended that this case presents an issue for which there are no judicially manageable standards. Rather, respondents' sole contention is that the Constitution assigns to the Senate the exclusive power to decide what an impeachment trial will entail, and that, even if that trial consisted entirely of flipping a coin, the courts have no power to review that decision.

In evaluating respondents' preclusion claim, it is appropriate to recall that it was established early in this country's constitutional jurisprudence that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This is especially true where a governmental action is alleged to violate the Constitution. As the Court stated in *Marbury*, "[s]o if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty." *Id.* at 177-78; *see also United States v. Nixon*, 418 U.S. 683, 703 (1974) (reaffirming *Marbury*).

In our system, the courts can and do decide whether an action exceeds limitations imposed on a constitutional grant of power. The inquiry in such cases is one for which the courts are particularly well-suited. The courts must interpret the Constitution to determine whether there are any constraints on the power being exercised. The most likely constraints on the grant of power are those contained in the constitutional grant of power itself, or those established by other fundamental rights or constitutional principles. If there are any such limitations, then the courts have the power, and indeed the duty, to decide whether the challenged action exceeds those limitations.

It is only where the Constitution directs that a challenged action is within the exclusive province of one of the political branches that the courts are without authority to review the action. While challenges to such actions could be called "political questions," that kind of determination is only reached at the conclusion of what is often an in-depth judicial analysis of the Constitution, against the backdrop of the history of the constitutional convention and its aftermath. *See, e.g.*, App. A (Williams, J.) Indeed, in *Baker v. Carr*, 369 U.S. at 211, the Court recognized that the judiciary has a vital role in deciding whether a question has been committed entirely to another branch:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is the responsibility of this Court as the ultimate interpreter of the Constitution.

In other words, the court is not abstaining from ruling in such a case. Instead, it is construing the constitutional provisions at issue to determine whether the Constitution establishes judicially enforceable limitations on the actions of another branch.

Even where the court concludes that it has no power to decide the underlying legal question, it reaches that conclusion not because the judiciary is necessarily incapable of making that

legal determination. To be sure, there are instances in which the Constitution assigns to one of the political branches a particular type of determination that the courts are ill-equipped to decide, such as whether a state government is republican or not, or whether a certain country or ambassador should be recognized. *See Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). In such cases, the issue may be seen as textually committed to another branch, but that is principally because there are no manageable standards for the courts to apply in deciding the issue.

However, the Constitution also commits matters to the political branches that the courts are quite capable of deciding. For example, the courts could make factual determinations as to which of two candidates received the most votes in a congressional election. Nonetheless, the Constitution may still assign those determinations to another branch of government, not because there are no judicially manageable standards, but because the Framers decided, for other reasons, that the function should be performed by another branch of government. In those cases, the courts are precluded from ruling on the merits of a challenge in much the same way that the courts are precluded from evaluating certain agency actions under the Administrative Procedure Act, 5 U.S.C. § 701(a)(1) and (2).

Whatever the result, the courts cannot avoid their judicial duty to construe constitutional provisions to ascertain whether the courts have been denied a role in the process and hence whether another branch will have the final say. Most recently, this Court held unanimously that the political question doctrine does not bar judicial review of Congress's selection of a particular apportionment method. *Department of Commerce v. Montana*, 60 U.S.L.W. 4279 (U.S. March 31, 1992). The Court found it significant that the parties agreed that Article I, section 2, clause 3 of the Constitution imposes some limitations on Congress's apportionment power that are judicially enforceable, but offered differing interpretations of those limitations. 60 U.S.L.W. at 4283. Faced with the task of deciding the proper interpretation, the Court stated that a decision that a constitutional provision is not judicially enforceable "is of course very different from deter-

mining that a specific congressional action does not violate the Constitution. That determination is a decision on the merits that reflects the *exercise* of judicial review, rather than an *abstention* from judicial review that would be appropriate in the case of a true political question." *Id.* at 4284 (footnote omitted, emphasis in original).

Similarly, in *Powell v. McCormack*, 395 U.S. 486 (1969), the Court upheld a challenge to the House of Representative's exclusion of one of its Members, who had argued that the House had no constitutional power to refuse to seat him since he met the qualifications for office set forth in Art. I, § 2, cl. 2. The congressional officials took the position that, by making each House the judge of the qualifications of its own members, Art. I, § 5, cl. 1, the Constitution gave the House unreviewable authority to decide whom to seat.

In rejecting the contention that the case presented nonjusticiable political questions, the Court laid out two possible constructions of the constitutional provision at issue:

> If examination of § 5 disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine. On the other hand, if the Constitution gives the House power to judge only whether elected members possess the three standing qualifications set forth in the Constitution, further consideration would be necessary to determine whether any of the other formulations of the political question doctrine are "inextricable from the case at bar."

395 U.S. at 520-21 (footnotes and citation omitted). The Court then found no barrier to judicial review and ruled that the Constitution does not give the House the power to exclude Members based on qualifications other than those set forth in the Constitution. In a footnote, the Court elaborated on the applica-

bility of the political question doctrine, stating:

> Consistent with this interpretation, federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution.

Id. at 521 n.42. In other words, if there were disputed evidence concerning a Member's length of residency, and the House made a determination that the Member did not meet the constitutional residency qualification, there might be no right to judicial review of that determination.

The Elections Clause, Art. I, § 5, cl. 1, gives Congress this type of unreviewable authority to judge the elections of its Members. Thus, each House is the sole determinant of which candidate is entitled to a seat in Congress, and the courts have no role in reviewing that determination. *See Roudebush v. Hartke*, 405 U.S. 15, 18-19 (1972); *accord Morgan v. United States*, 801 F.2d 445, 449-51 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 911 (1987); *McIntyre v. Fallahay*, 766 F.2d 1078, 1081-82 (7th Cir. 1985); *id.* at 1087 (Swygert, J., dissenting on other grounds). Such preclusion is based not on any inability of the courts to decide the outcome of disputed elections, but on the Constitution's assignment of the power to the House of Representatives for other reasons, such as the need for a prompt decision and political accountability. However, even that preclusion does not bar judicial challenges of legislative resolutions of disputed elections that exceed other constitutional limitations. *See Morgan*, 801 F.2d at 451.

Similarly, although the Constitution gives Congress the power to determine the rules of its proceedings, that power is constrained by other constitutional provisions and by fundamental rights. *United States v. Ballin*, 144 U.S. 1, 5 (1892). It is, therefore, within the judicial authority to decide whether a congressional rule violates these general constitutional norms. In contrast, since the Constitution does not prescribe how the presence of a majority in either House of Congress is to be

determined, this Court has held that "it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain that fact." *Id.* at 6.

Likewise, while Congress has the constitutional power "to establish an uniform rule of naturalization," Art. I, § 8, cl. 4, the political question doctrine does not oust the courts from deciding whether the means chosen to implement that power are unconstitutional. *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 940-42 (1983); *see also Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 111 S. Ct. 2298, 2309 (1991) (Congress's exercise of its power to dispose of federal property, Art. IV, § 3, cl. 2, is constrained by the doctrine of separation of powers); *South Dakota v. Dole*, 483 U.S. 203, 206-08 (1987) (Congress's power under the Spending Clause, Art. I, § 8, cl. 1, is limited by that Clause and by fundamental rights); *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 249-50 (1985) ("Congress' plenary power in Indian affairs under Art. I, § 8, cl. 3, does not mean that litigation involving such matters necessarily entails nonjusticiable political questions"); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977) (Congress' power to regulate Indian affairs is subject to constitutional limitations).

Not only is it within the province of the courts to determine whether the challenged actions exceed any limitations imposed by the Constitution, but judicial exercise of that power is also not barred because of any lack of respect for a coordinate branch that might ensue. *See Powell*, 395 U.S. at 548-49. As Justice Powell stated in his concurring opinion in *Goldwater v. Carter*, 444 U.S. 996, 1001 (1979), "[i]nterpretation of the Constitution does not imply lack of respect for a coordinate branch." On the other hand, if the Constitution commits unreviewable power to one of the political branches, then the judiciary would usurp that branch's constitutional role by deciding that the branch exceeded its constitutional authority. Such usurpation would show disrespect only because the judiciary has no role in the matter, not because it disagrees with the other branch. In other words, the lack of respect prong of the political question has no meaning when the

real issue is whether the Constitution grants unreviewable decision-making power to another branch of government.

II. THE COURTS HAVE THE POWER TO DECIDE WHETHER PETITIONER'S IMPEACHMENT TRIAL VIOLATED THE CONSTITUTION.

Apart from the particular clause at issue here, the Constitution establishes several other constitutional constraints on the Senate's power to try impeachments that even respondents concede give rise to judicially enforceable rights. Opp. Cert. at 13; App. 42a, 68a. Thus, the Senate's power applies only to civil officers who have been impeached by the House, and then only for impeachable offenses; the Senate must be under oath or affirmation; the Chief Justice must preside when the President is tried; and two-thirds of those present must vote for a conviction. Art. I, § 3, cl. 6 & § 2, cl. 5; Art. II, § 4. In addition, the only judgment that may constitutionally be rendered is removal from office and disqualification from holding future offices of the United States. Art. I, § 3, cl. 7. In each of these respects, the Constitution imposes constraints on the Senate's impeachment power.

As Professor Louis Henkin has concluded, the courts have the power to review Senate impeachment proceedings "for constitutional excesses or infirmities." Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 605 n.26 (1976). If the Senate convicted an individual who did not hold civil office or who had not been impeached by the House of Representatives, certainly a court has the power to enforce the constitutional limitations on the Senate's power. Indeed, respondent's opposition to certiorari appears to concede that the courts might be able to hear such a case. Opp. Cert. at 13. Similarly, if the Senate refused to permit the Chief Justice to preside over the impeachment trial of the President, or it did not sit under oath or affirmation, or it convicted an individual by a simple majority vote, the courts would have the power to declare that action unconstitutional. The same would be true if the Senate sought to impose monetary sanctions or some other penalty different from removal from office and future disqualification.

Given these clear constitutional constraints on the Senate's impeachment power, respondents, like the government in *Department of Commerce v. Montana*, "do[] not suggest that all congressional decisions relating to [impeachment] are beyond judicial review." 60 U.S.L.W. at 4283. Where the parties differ is over the extent to which the Constitution imposes judicially enforceable rights in the impeachment context.

Specifically, respondents contend that, because the Constitution states that "[t]he Senate shall have the *sole* power to try all impeachments," Art. I, § 3, cl. 6 (emphasis added), the courts have no role in deciding whether a particular impeachment proceeding comports with the constitutional mandate to "try" impeachments. However, this argument gives far too much weight to the use of the word "sole." First, the Constitution obviously does not give the Senate an entirely free rein in the impeachment arena, as illustrated by the numerous constitutional limitations described above that constrain the Senate's impeachment power. Second, whatever the Senate's sole power is, it is assigned to the Senate, which, under other provisions of the Constitution, must have a majority to do business. Art. I, § 5, cl. 1. Therefore, even if the Senate has the sole (and unreviewable) power to decide the precise procedures to employ in an impeachment trial, it may be constitutionally precluded from rendering a verdict unless a majority of the Senate is present. Third, simply because the Constitution gives the Senate the sole power to conduct impeachment trials does not necessarily mean that the term "try" is devoid of any limitations on the type of proceeding to be conducted. A more logical inference is that the Constitution makes the Senate the final judge of guilt or innocence, subject to whatever procedures the term "try" imposes on the proceeding. Since the courts have a role in determining whether impeachment proceedings violate the other constitutional limitations described above, there is no reason to believe that the Framers intended to oust the courts from deciding whether the term "try" imposes other limitations on the Senate's impeachment proceedings, and in enforcing any such limits.

The question then is whether the Constitution assigns to the Senate alone not only the sole power to try impeachments, but

also the sole power to decide what procedures constitute a trial. The implications of respondents' position on nonreviewability are truly disturbing. Indeed, even the district court agreed that petitioner would present a justiciable and likely meritorious challenge "if he were convicted without any semblance of a trial." App. B at 68a. For example, if the Senate had voted to convict based solely on what the Senators had heard or read in the media about the judge's trial, or if the Senate decided to flip a coin to decide whether to convict, surely the Senate's action would not be a trial. Similarly, it would be difficult to conclude that the Senate conducted a "trial," if it had voted to convict an individual without any trial-type proceedings, based solely upon that individual's conviction by a court of a felony, as one of the articles of impeachment of Judge Harry E. Claiborne invited the Senate to do. H. Res. 461, Article III (July 22, 1986), *reprinted in Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, a Judge of the United States District Court for the District of Nevada*, 99th Cong., 2d Sess. at 3 (S. Doc. No. 99-48, 1986). Or, as the court of appeals judge who dissented on the justiciability issue observed, petitioner would present a cognizable claim if the Senate had delegated the power to try impeachments to a randomly chosen group of schoolchildren. *See* App. A at 42a (Edwards, J.) Yet, according to respondents, the courts could do nothing about any of these clear violations of the command to the Senate to "try" all impeachments.

In contrast, it is our view that the constitutional direction to the Senate to "try" all impeachments carries with it *some* judicially enforceable limitations on the process by which the Senate may convict and remove civil officers from office. However, the fact that there are some limits does not mean that the Senate is left with no discretion in formulating appropriate trial procedures. Not every procedural right that attaches in criminal proceedings, ranging from discovery rights to evidentiary rules, must necessarily be incorporated into impeachment trials by virtue of the command to the Senate to "try" impeachments. However, based on the Constitution, its history, and its aftermath, this Court can determine what limitations adhere to the direction to the Senate to "try" all impeachments, and then it can enforce those limitations. That kind of ruling, however, is a ruling on the merits and

not an application of the political question doctrine. Thus, even if the Court decides that petitioner has no judicially enforceable right to a trial before the full Senate, the Court will not have abstained from ruling, but rather will have pronounced the meaning of the constitutional command at issue and decided whether it was violated. In short, this case does not involve a political question, but rather raises a difficult constitutional question concerning the meaning of the term "try" in Article I, section 3, clause 6.

CONCLUSION

For the reasons set forth above, the court of appeals decision that this case presents a nonjusticiable controversy should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

WALTER L. NIXON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, CONGRESSMAN F. JAMES SENSENBRENNER, CONGRESSMAN GEORGE W. GEKAS, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. with over 100,000 members and

supporters nationwide.[1] WLF regularly appears before federal courts and where appropriate, has filed *amicus curiae* briefs in particular cases arguing that pursuant to Article III of the Constitution and the separation of powers doctrine, courts are prohibited from adjudicating those cases which present nonjusticiable political questions, which are unripe or moot, or where the plaintiffs lack standing. *See, e.g.,Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990); *Public Citizen v. Office of U.S. Trade Representative*, No. 92-5010 (D.C. Cir., argued May 4, 1992).

WLF also has a particular interest in judicial discipline and procedures and has filed a number of judicial misconduct complaints against federal judges under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c). In addition, WLF testified before the National Commission on Judicial Discipline and Removal on May 1, 1992, regarding judicial disciplinary procedures, and supports measures to make those procedures more effective. While WLF believes that the use of a special Senate Impeachment Committee of 12 senators to receive evidence on the articles of impeachment against petitioner was constitutional and desirable, WLF submits that it would be an improper exercise of judicial power for this Court to adjudicate the merits of petitioner's claim.

Congressman F. James Sensenbrenner is a member of the House Committee on the Judiciary and was one of five House managers appointed by the House of

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[1] By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

Representatives pursuant to House Resolution 150 "to try the impeachment" of petitioner. 135 Cong. Rec. S5132 (daily ed. May 11, 1989). Congressman Sensenbrenner participated in the impeachment proceedings of the petitioner before the Senate Impeachment Committee and the full Senate. Congressman George W. Gekas is also a member of the House Judiciary Committee and was appointed a House manager in the impeachment proceedings of former Judge Alcee Hastings.

While both Congressmen Sensenbrenner and Gekas believe that the procedures used by the Senate to try Walter Nixon were constitutional, they too believe that a ruling on the merits, even one upholding the procedures used, would inevitably permit the courts to superintend congressional processes. Such a ruling would invite petitioner and others who already have been impeached and convicted to challenge other aspects of the impeachment process and procedures used by the Senate or House of Representatives in carrying out their respective responsibilities under the Impeachment Clauses of the U.S. Constitution.

The Allied Educational Foundation (AEF) is a non-profit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including constitutional law, and has appeared before this Court with WLF in a number of cases. AEF agrees with its fellow *amici* that this case presents a nonjusticiable political question.

STATEMENT OF THE CASE

Petitioner, Walter L. Nixon, Jr., was convicted in 1986 on two counts of making false statements before a

grand jury with respect to allegations of accepting an unlawful gratuity to influence a state criminal proceeding, and his conviction and the subsequent denial of a new trial were affirmed on appeal. *See United States v. Nixon*, 816 F.2d 1022 (5th Cir. 1987); *United States v. Nixon*, 881 F.2d 1305 (5th Cir. 1989). Thereafter, he was impeached by the House of Representatives on May 10, 1989 on three articles for high crimes and misdemeanors, including the two counts for which he was criminally convicted.

The Senate received the articles of impeachment, took the prescribed oath under Art. I, sec. 3, Cl. 6, and passed Senate Resolution 128 implementing Rule XI of the Senate Rules of Procedure and Practice When Sitting on Impeachments Trials (hereinafter "Rule XI"). 135 Cong. Rec. S5133 (daily ed. May 11, 1989). Rule XI--enacted originally in 1936 to facilitate the impeachment process but not used until 1986 beginning with the impeachment trials of Judge Harry Claiborne, and later for the trials of Judge Alcee Hastings, and petitioner--provides that a committee of 12 senators may hear and take testimony and evidence, and thereafter compile and report to the full Senate an evidentiary record, without recommendation of guilt or innocence. Senate Manual, S. Doc. No. 1, 101st Cong., 1st Sess. (1989). Rule XI also provides that the Senate can send for any witness to be examined before the full Senate.

The Senate Impeachment Committee in this case heard testimony in September 1989 over four days from ten witnesses, including the petitioner. Petitioner's counsel was able to cross-examine witnesses and to present his own witnesses. Contrary to petitioner's suggestion, the other 88 senators were not prohibited by Rule XI or otherwise from attending these proceedings. The proceedings were broadcast live to all senators, and

videotapes and transcripts of the proceedings were also made available to each senator.

On November 1, 1989, the Senate resumed its consideration of the articles of impeachment and deemed itself to be "sitting for the trial of the articles of impeachment" against petitioner. 135 Cong. Rec. S14,493 (daily ed. Nov. 1, 1989). Having received the extensive evidence from the impeachment committee and after hearing arguments for over three hours, including those from the petitioner and his attorney, the Senate deliberated the next day in closed session for over six hours. On November 3, 1989, the Senate denied petitioner's motion for a "full trial before the full Senate," and voted to convict on the two articles of impeachment that mirrored the two criminal counts for which petitioner was found guilty. *Id.* at S14,635-636.

Petitioner filed the instant case in the district court seeking only declaratory relief that his conviction is void because Rule XI prevented him from getting a full and fair trial on the Senate floor. In particular, he argues that because the testimony of some of the witnesses which contradicted the testimony of the petitioner was heard live by only 12 members of the Senate who were on the Committee, and that only a written transcript of that testimony was before the full Senate, 88 senators were allegedly deprived of the opportunity to judge the demeanor of those witnesses. Accordingly, petitioner claims that the full Senate did not actually "try" him as required by the Constitution.

Significantly, petitioner conceded below that if the proceedings that transpired before the Committee were conducted on the Senate floor, he would not have a case even if many of the senators would not actually be present during the testimony. 938 F.2d at 265; Pet. App.

F at 84a-85a. And while the record is admittedly silent as to how many senators either watched the proceedings via live broadcast or afterwards by videotape, *Nixon v. United States*, 744 F.Supp. 9, 10 (D.D.C. 1990), the petitioner does not allege or argue that those senators did not avail themselves of this opportunity. Thus, for purposes of his legal argument, petitioner must of necessity be arguing that he is entitled to a favorable ruling even if all of the senators *did* avail themselves of this opportunity. While petitioner also claims at length that the Rule XI proceedings are "inherently unfair to the accused," Pet. Br. 33, petitioner did not raise below or in this Court any violation of his due process or other constitutional rights.

The district court ruled that this case presented a nonjusticiable political question because of the textual committment to the Senate to try impeachments. 744 F. Supp. 9 (D.D.C. 1990). The court of appeals affirmed per Judge Williams, ruling that the legal issue presented was a nonjusticiable political question. 938 F.2d 239 (D.C. Cir. 1991). Judge Randolph concurred, but stated that separation of powers concerns preclude courts from interfering in Senate impeachment proceedings. *Id.* at 246. Judge Edwards concurred in the judgment only, stating that a court could reach the merits, and that the Constitution allows the Senate the flexibility to use impeachment committees to gather evidence. *Id.* at 248.

In his petition for writ of certiorari, the petitioner presented the question as whether the Rule XI Senate Impeachment Committee proceedings satisfied the provision of Article I, sec. 3, cl. 6 that the Senate "try all Impeachments" because 88 senators were allegedly unable to evaluate witness credibility. Cert. Pet. at i. Petitioner also argues, but does posit as a question presented, that the Rule XI proceedings also violates the

Impeachment Clause's requirement that senators be "'present' and 'sitting' on 'oath,' [when] deciding whether to 'convict' or acquit." Pet.Br. at 28; *id.* at 26.

SUMMARY OF ARGUMENT

While *amici* believe the Rule XI proceedings do not run afoul of the constitution's Impeachment Clause, petitioner's attack on his conviction invites the courts to resolve a nonjusticiable political question. While petitioner frames the question presented as to whether the Rule XI committee hearing satisfied the Senate's duty to "try" impeachments, the real question is whether the trial he indisputably received before the full Senate on the Senate floor, which included the receipt and consideration of the evidence taken and assembled by the Rule XI committee, was constitutionally sufficient under the "try" provision of the Impeachment Clause. Another way of looking at the case is to determine whether the proceedings before the Impeachment Committee were also before the full Senate as well, albeit electronically. However the question is framed, the resolution of this issue raises nonjusticiable political questions and would lead to court supervision of Senate and House impeachment procedures and challenges to the validity of impeachments under provisions of the Impeachment Clause other than the "try" clause.

For example, since the gravamen of petitioner's claim is that 88 senators were constitutionally required to hear the live testimony of witnesses in order to better assess witness credibility, petitioner suggests that they were not "present" at that part of the trial; and since a conviction by the Senate can only be obtained by two-thirds of the Senate "sitting" and "present," Art. I, sec. 3, Cl. 6, the conviction is void because only 12 senators at best were physically "present" at that part of the trial.

Yet petitioner conceded that if the proceedings before the Rule XI committe had been conducted on the Senate floor, he would have no constitutional objection if 51 senators were present on the Senate floor (the minimal number to conduct Senate business), even though the composition of the 51 could apparently vary, with different senators leaving and arriving during the proceeding, and if he were thereafter convicted by two-thirds present or 34 votes. In other words, a hypothetical Rule XI committee of 20, 50, or even 99 members would not be constitutional according to petitioner's argument, but a trial on the Senate floor before an almost half-empty Senate chamber would pass muster.

Despite these strange results, a ruling on the merits would nevertheless invite petitioner and former Judges Hastings and Claiborne to raise arguments anew as to whether the senators who voted to convict were actually "present" for the trial, or whether, for example, they all actually took the prescribed "oath" as required by the Impeachment Clause, or having taken the oath, whether they violated it.

Accordingly, *amici* submit that the lower court should be affirmed on the grounds that the case is nonjusticiable principally on the grounds that it presents a political question under *Baker v. Carr*, 369 U.S. 186 (1962), either as formulated by Judge Williams speaking for the court, or on separation of powers grounds as articulated by Judge Randolph, which is, after all, the underlying principle upon which the political question doctrine is based. In any event, even if this Court does not conclude that it is barred from adjudicating this case on Article III grounds, the same arguments presented by *amici* clearly constitute ample prudential reasons why

the Court should decline to exercise its discretionary power to grant declaratory relief.

ARGUMENT

I. PETITIONER'S CLAIM PRESENTS A NONJUSTICIABLE POLITICAL QUESTION

The central genius of the Constitution is the separation of the executive, legislative and judicial functions of the federal government. In order to insulate the judicial branch of government from overreaching by the political branches, the Constitution provides that judges shall serve during good behavior without a fixed term of office. U.S. Const. Art. III, §1. The framers, however, were aware of the need to provide a check on a judiciary so tenured. The impeachment power of the House of Representatives and subsequent trial in the Senate is *the* principal constitutional check on the judicial branch of the federal government. As Alexander Hamilton wrote in *The Federalist* No. 79:

> The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. This is . . . consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.

The Federalist No. 79, 474 (Alexander Hamilton)(Rossiter ed., 1961).

Where the separation of powers is implicated, this Court has repeatedly acknowledged that issues which are committed by the Constitution to the legislative or executive branches of the federal government are "political questions" which a court may not adjudicate. *See Powell v. McCormack*, 395 U.S. 486, 518 (1969)(citing *Coleman v. Miller*, 307 U.S. 433 (1939); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918)); *Baker v. Carr*, 369 U.S. 186, 210 (1962). Following an extensive review of the justiciability of political questions, the Supreme Court in *Baker v. Carr* identified the elements of a nonjusticiable political question, and recognized the underlying separation of powers principle present in such cases:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due for the coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made, or the potentiality of embarrassment from multifarious

> pronouncements by various departments on one question.

Id. at 217. While respondents limited their political question arguments to only two of the *Baker v. Carr* factors, *i.e.*,the textual commitment and lack of respect criteria, *amici* believe that the issue presented satisfies at least four of the *Baker* criteria.

First, the Constitution explicitly commits the impeachment trial process to the Senate. Second, judicial review of the Senate's impeachment trial procedure would "reflect a lack of respect" for the Senate. Third, the importance of impeachment to the separation of powers provides "an unusual need for unquestioning adherence" to the decision of the Senate in an impeachment trial. Finally, judicial review of a conviction on impeachment charges would create the potentiality for embarrassment from "multifarious pronouncements" from the judicial and legislative branches of government on the legal status of a person convicted of impeachment charges.

A. Petitioner's Claim Involves Resolution Of Questions Committed By The Text Of The Constitution To A Coordinate Branch of Government

The first of the *Baker v. Carr* criteria is whether resolution of the issue presented is committed by the text of the Constitution to a coordinate branch of government. It is difficult to imagine a clearer example of such a commitment. The Constiution provides that "[t]he Senate shall have the sole Power to try all Impeachments." U.S. Const. art. I, § 3, cl. 6. As Judge Williams, writing for the Court of Appeals below, correctly noted: "Nowhere else does the Constitution

explicitly confer on a body the 'sole' power to do anything." 938 F.2d at 241.

The first court to construe the Impeachment Trial Clause gave the clause its ordinary meaning, holding that the clause expresses an "intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment." *Ritter v. United States*, 84 Ct. Cl. 293, 296 (1936). The court continued:

> The dictionary definition of the word "sole" is "being or acting without another" and we think it was intended that the Senate should act without any other tribunal having anything to do with the case. This would be the ordinary signification of the words and this construction is supported by a consideration of the proceedings of the Constitutional Convention and the uniform opinion of the authorities which have considered this matter.

Id.

Each of the courts since *Ritter* construing the Impeachment Trial Clause has found that the textual commitment in the Constitution of impeachment trials to the Senate precludes judicial review of the Senate's proceedings. In *Hastings v. United States Senate*, 716 F. Supp. 38 (D.D.C. 1989), in which petitioner intervened, the district court stated: "It is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution. Thus a classic

political question is presented under *Baker v. Carr*."[2] *Id.* at 40 (citation omitted). The district court below likewise held that petitioner's claims were not justiciable due to the "Constitution's textual commitment to the Senate of the 'sole Power to try all Impeachments.'" *Nixon v. United States*, 744 F. Supp. 9, 14 (D.D.C. 1990). On appeal, Judge Williams, writing for the court, concluded that the political question doctrine as defined in *Baker* precluded judicial review of petitioner's claims, due to a textual commitment of impeachment trials to the Senate. 938 F.2d at 241-46. Judge Randolph, concurring in the court's opinion, was hesitant to rely upon the political question doctrine, basing his conclusion that petitioner's claims are not justiciable on separation of powers grounds, because the Constitution provides no role for the courts in the impeachment process. *Id.* at 246-48 (Randolph, J., concurring).

In his brief, petitioner argues that the Impeachment Trial Clause should be construed without reference to the inclusion of the word "sole," because that term was included in the Impeachment Trial Clause as a "cosmetic edit" by the Committee of Style, and construed without the word "sole," the Impeachment Trial Clause is fully justiciable under *Powell v. McCormack*. Pet. Br. at 42-43. According to petitioner's argument, since the Committee of Style "was appointed only to revise the st[y]le of and arrange the articles which had been agreed to," and "had no

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[2] The decision of the district court in Hastings was affirmed on appeal on other grounds. The court of appeals held that the appellants' claims were not ripe for judicial consideration, because at the time the action was brought neither appellant had been convicted by the Senate of the impeachment charges brought by the House of Representatives. Hastings v. United States Senate, 887 F.2d 332 (D.C. Cir. 1989).

authority to make alterations of substance in the Constitution as voted by the Convention," the word "sole" should not be accorded any significance. Pet. Br. at 42 (citations omitted). This argument proves *amici's* point. As a review of the development of the Impeachment Trial Clause illustrates, discussed at length in Judge Williams' opinion below, the inclusion of the word "sole" by the Committee of Style merely reflects the framers' view that the conduct of the impeachment trial was the responsibility of the Senate and that no other branch of government was thought to have any role in it. 938 F.2d at 241-244.

The historical development of the Impeachment Trial Clause supports this construction. Because Judge Williams' opinion describes in detail the development of the Impeachment Trial Clause, 938 F.2d at 241-44, *amici* will not repeat that discussion here. However, Judge Williams' review of the historical development of the Impeachment Trial Clause vividly demonstrates the care with which the framers evaluated the relative institutional qualifications of the three branches of government to try impeachments, leading to the "textually demonstrable constitutional commitment" of impeachment trials to the Senate.

While the concept of impeachment was borrowed from English law, *see* The Federalist No. 65, at 397 (Rossiter ed.), the framers debated at length the proper forum for the impeachment trial. The early proposals contemplated trial of impeachments of "National Officers" in judicial courts. *See Records of the Federal Convention* 18, 20, 23 & n.14, 242, 244 (M. Farrand ed. 1966) [hereinafter "Farrand"]. After considerable debate, the framers settled on a procedure whereby the House of Representatives is responsible for bringing impeachment charges and the Senate is responsible for

the trial of those charges. Accordingly, the allocation of the impeachment trial to the Senate reflects a clear rejection of any proceeding in the courts.

Further textual support for the Senate's adoption of Rule XI can be found in the Rulemaking Clause, which states that "[e]ach House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. As this Court explained in *United States v. Ballin*, the rules adopted by the House and Senate are "absolute and beyond the challenge of any other body or tribunal" so long as they do not "ignore constitutional restraints or violate fundamental rights." 144 U.S. 1, 5 (1892). Accordingly, even if the Impeachment Trial Clause does not make the entire impeachment trial beyond judicial review in all cases, the Rulemaking Clause places Rule XI beyond review unless it can be established that the Rule "ignores constitutional restraints or violates fundamental rights." *Id.* Because Rule XI does not ignore constitutional restraints or violate fundamental rights, petitioner's claims are not justiciable.

B. Judicial Resolution of Petitioner's Claims Is Impossible Without Expressing Lack Of Respect Due A Coordinate Branch Of Government

The second of the *Baker* criteria is met where judicial resolution is impossible without expressing a lack of respect due a coordinate branch of government. *Amici* recognize that prior holdings of this Court provide that courts may express a contrary conclusion on a constitutional issue considered by a coordinate branch of government without expressing a lack of respect. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 549 (1969). However, the case for deferring to the

Senate's careful consideration of the constitutional issues in this case is especially strong.

The framers were keenly aware of the relative strengths and weaknesses of the three branches of the federal government. The allocation of impeachment trials to the Senate was a result of the framers' careful considerations regarding the role of impeachment proceedings in the separation of powers which dominated their concerns of the federal convention and concerns regarding the institutional capabilities of the three branches of the federal government. Impeachment trials were dedicated to the Senate because impeachment proceedings are "of a nature which may with peculiar propriety be dominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." Federalist No. 65, at 396 (Alexander Hamilton)(Rossiter ed. 1961)(emphasis in original).

Petitioner would presumably concede that the Senate is given the sole power to conduct the impeachment trial and make factual determinations, but argues that the role of the courts is "to say what the law is," and that the Senate's consideration of the constitutionality of Rule XI is entitled to no particular deference. Pet. Br. at 40. This view is at odds with Chief Justice Marshall's mandate that "the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

As Judge Randolph in the court of appeals also noted, court imposition of rules governing Senate proceedings under the guise of defining "try" would lead to court review of compliance with those proceedings. 938 F.2d at 247. A court would also be expressing a lack of respect for the procedures adopted by the Senate in carrying out its constitutional powers, namely, Rule XI. Assume for the sake of argument that this Court concludes that the term "try" has sufficient constitutional meaning to require the full Senate to hear all witnesses and view their demeanor before they can vote whether to convict or acquit. Such a holding would inevitably lead to judicial appeals of impeachment convictions on the grounds that particular senators who voted for conviction were absent from the Senate floor, for however short a duration, during certain parts of the testimony that petitioner deemed crucial to his case. After all, if a juror in a criminal case were absent or asleep during part of the trial, the validity of the conviction could be challenged. Judicial consideration of such lawsuits would inevitably lead to judicial micromanagement of Senate impeachment proceedings of a sort which clearly expresses a lack of respect for the Senate.

C. There Is An Unusual Need For Unquestioning Adherence To A Political Decision Already Made

The framers' concerns regarding the institutional capabilities of the various branches of the federal government also support the conclusion that review of the procedures employed by the Senate in an impeachment trial is not justiciable under *Baker v. Carr* due to an unusual need for unquestioning adherence to a political decision already made.

One of the early proposals at the Federal Convention for the impeachment trial was Hamilton's proposal that impeachments be tried by a special court of the chief justices of the state supreme courts. *See* 1 Farrand at 292. Hamilton later explained the rejection of that proposal in terms which equally apply to judicial review of impeachment proceedings. In his view, impeachment trials require prompt attention and final action because:

> the injury to the innocent, from the procrastinated determination of the charges which might be brought against them; the advantage to the guilty, from the opportunities which delay would afford intrigue and corruption; and in some cases from the detriment to the State, from the prolonged inaction of men whose firm and faithful execution of their duty might have led them to the persecution of an intemperate or designing majority in the House of Representatives.

Federalist No. 65, at 400 (Alexander Hamilton)(Rossiter ed. 1961).

As a practical matter, a ruling which permits judicial review of a conviction of impeachment would leave unsettled the legal status of the officers who have been convicted by the Senate. In the case of impeachment of the President, the national and international chaos that would result from the doubt of the validity of the Senate conviction would be enormous. *See* C. Black, *Impeachment: A Handbook* 53-55 (1974). Similar concerns would apply as well in the case of a federal judge. Would an order issued by the

convicted judge releasing a prisoner from custody, for example, be valid on the grounds that the judge was not properly impeached and convicted? As Judge Williams properly noted, "the need for finality in impeachments is even more acute" than in other cases where the courts normally defer to the legislative branch. 938 F.2d at 245.

D. Judicial Review Of Petitioner's Claims Will Create The Possibility Of Embarrassment From Multifarious Pronouncements By The Judicial And Legislative Branches

The fourth *Baker v. Carr* criterion satisfied by this case is the possibility of embarrassment from contrary conclusions regarding the status of petitioner by the Senate and the Judiciary.

In seeking to avoid the jurisdiction of the Court of Claims, petitioner has argued that this case involves more than payment of back pay. Presumably, petitioner believes that declaratory judgment in his favor would entitle petitioner to return to his former position as Chief Judge of the District Court for the Southern District of Mississippi. If the district court had ruled on the merits in favor of petitioner, his resumption of judicial powers would cause uncertainty while an appeals court reviews the matter. One could easily imagine, without much difficulty, the embarrassment from differing pronouncements by the judicial, legislative, and even the executive branch which must pay the salary of the judge and carry out its orders, on the legal status of the "convicted" judge. For this reason, the court should also exercise judicial restraint.

E. The Senate's Procedures Did Not Violate A Constitutional Limitation Of Its Powers And Hence, This Case Is Not Controlled By *Powell v. McCormack*

Petitioner's argument that his claims are justiciable is based upon this Court's decision in *Powell*. In *Powell*, Adam Clayton Powell, Jr. challenged a House of Representative's decision barring him from taking his seat. The House, citing alleged financial misconduct, contended that it had "judged" Powell unqualified to serve as a member. Powell argued that "qualifications" under Article I, section 5, clause 1 of the Constitution, which provides that "each House shall be the judge of elections, returns and qualifications of its own members," must be construed to include only the standing requirements expressly listed in the Constitution itself (*i.e.*, age, citizenship and residency). The House insisted that the Constitution assigned nonreviewable discretion to the Congress to define and judge those "qualifications" for itself. The essence of the Court's holding in *Powell* is that Powell's claim was justiciable because courts may review claims that Congress has exceeded an explicit textual limitation on its powers. *See Morgan v. United States*, 801 F.2d 445, 448 (D.C. Cir. 1986) (Scalia, J.), *cert. denied*, 480 U.S. 911 (1987).

Petitioner asks this Court to conclude that the word "try" in the Impeachment Trial Clause has sufficiently definite meaning to impose a constitutional restraint on the Senate's use in an impeachment trial of testimony taken by a committee of the Senate pursuant to Rule XI. This conclusion cannot be supported by the text of the Constitution. As Judge Gesell stated in *Hastings v. United States*, 716 F. Supp. 38 (D.D.C. 1989):

> The Constitution does not say that the full Senate must try all impeachments, nor does the verb "try" necessitate granting the accused all of the requirements of modern criminal due process as [Judges Nixon and Hastings] suggest. In fact, at the time the Constitution was drafted, definitions of "try" included "to sit in judgment" and "to examine (a person) for the purpose of testing his qualifications." [footnote omitted] Of course, persons and bodies may sit in judgment without having received evidence in the manner that Article III Courts try criminal charges.

Id. at 40-41.

This district court in the instant case also favorably compared the Impeachment Committee to the use by civil courts of special masters to take and compile evidence. 744 F. Supp. 9, 13. Petitioner claims to find support for his preferred construction of the Impeachment Trial Clause in the constitutional provision regarding jury trials. Pet. Br. at 26-27. According to petitioner, the Senate is required to do more than "vote on" the charges and that Article III, section 2, clause 3, by implication, requires the Senate to "actually hear the evidence of guilt or innocence." *Id.* Petitioner's brief mischaracterizes Rule XI and the actions that the Senate took during his impeachment trial. Rule XI authorizes the Impeachment Trial Committee to take testimony which is reported to the full Senate without recommendation of conviction or acquittal. Rule XI expressly provides that the Senate may send for any witness and hear testimony in open

Senate. The Senate remains the trier of all questions of fact and law.

Pursuant to Rule XI, the Senate received the testimony and evidence presented before the Impeachment Trial Committee. The Senate thoughtfully considered and debated the charges brought against petitioner during the course of three days, during which petitioner and his counsel made their arguments based upon the record which had been developed. Following the proceedings on the floor of the Senate, the Senate voted to convict petitioner on two of three impeachment charges brought by the House. Perhaps if the Senate had voted to convict petitioner without consideration of any evidence of guilt or innocence, the Senate would not have provided petitioner with a trial as required by the Impeachment Trial Clause. However, such is clearly not the case here.[3]

The historical development of the Impeachment Trial Clause likewise does not support petitioner's view that the term "try" imposes constitutional limitations on the Senate's rules of procedure. While considerable attention was given to the proper forum for the impeachment trial, there is very little evidence of debate at the Federal Convention on impeachment trial procedure, beyond who should preside in a trial of the

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[3] There could very well be a case where a judge or other officer was criminally convicted of a felony, conceded that he was guilty, but nevertheless believed that the crime was not so serious as to require resignation, or for whatever reason, wanted to force the House and Senate to remove him from office by impeachment and conviction. Under petitioner's theory, the House and Senate would be precluded from using "Congressional notice" of the criminal conviction and would be required to retry the entire criminal case in toto.

President. *See*, Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters and Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U.L. Rev. 512, 520 (1975) [hereinafter, "Williams"]. The lack of consideration given to impeachment trial procedure suggests that the Senate was thought competent to adopt rules of procedure pursuant to its rulemaking power. *Id.* As Chief Justice Rehnquist has written:

> The framers were sufficiently practical to know that no charter of government could possibly anticipate every future contingency and they therefore left considerable room for "play in the joints." Nor did they try to foresee exactly how each of the many powers and checks and balances they conferred and established would work out in particular situations. That was of necessity left to future generations.

Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 10 (1992).

Petitioner argues that the framers' rejection of the English practice of removing judges "by address" in requiring a trial says something about the type of proceedings to be accorded. Pet. Br. at 5, 30. The requirement of an impeachment trial was intended to permit the removal of high officials for malfeasance while limiting the potential for overreaching by the legislative branch. *See* Rehnquist, *supra* at 9. On the other hand, the essence of removal of judges from office "by address" is that the judge is removed *without* assigning cause. *See* Ziskind, *Judicial Tenure in the*

American Constitution: English and American Precedents, 1969 Sup.Ct.Rev. 135, 137. Petitioner does not argue that he was removed from office without cause or for improper reasons. It is simply absurd, therefore, for petitioner to argue that the trial he did receive, with notice of specific charges, the receipt and consideration of volumes of evidence, and arguments by petitioner and his counsel, resembles the English practice of removal "by address." Pet. Cert. at 26.

Petitioner's complaint is with the type of proceeding in which the Senate received evidence of petitioner's guilt or innocence and concluded that petitioner was guilty of two impeachable offenses. Accordingly, the rejection of the English practice of removing judges "by address" does not support the construction of the word "try" urged by petitioner here.

On the contrary, use of committees such as the Impeachment Trial Committee employed in the trial of petitioner were known by the framers to have been used in England, and nothing in the historical record suggests that the framers opposed their use. *See* Williams, supra, 50 N.Y.U.L. Rev. at 537-38. What record does exist suggests that the framers did not object to the use of committees in impeachment proceedings. 938 F.2d at 263. Indeed, Thomas Jefferson, sitting as the second President of the Senate soon after the ratification of the Constitution, included a section on impeachment procedures in his *Manual of Parliamentary Practice*, which explicitly approved of the use of committees. *Jefferson's Manual of Parlimentary Practice*, *reprinted in* H.R.Doc. No. 256, 101st Cong., 2nd Sess. 109, 306 (1985).

Even if the merits of petitioner's claim may be considered in assessing whether a case is justiciable, the

basis for petitioner's conclusion is not true. The procedures adopted by the Impeachment Trial Committee provided that the entire hearing was taped and broadcast to each senator's office. Senators were permitted to replay the tape at any time so as to evaluate the credibility of witnesses. Indeed, the report of the Impeachment Trial Committee encouraged each senator to do so. *See Nixon*, 744 F. Supp. at 10. To facilitate preparation for the impeachment trial of petitioner, the Impeachment Trial Committee completed its hearings nearly six weeks prior to the commencement of the trial on the Senate floor, and completed its report more than two weeks prior to the trial, in each case so that senators would have the opportunity to review the tape of the proceedings. *See Proceedings of the United States Senate in the Impeachment Trial Against Walter L. Nixon, Jr.*, S.Doc. No. 22, 101st Cong., 1st Sess. iii, 10 (1989). There clearly was no rush to judgment. Finally, Rule XI does not prohibit senators who were not members of the Impeachment Trial Committee from attending the Committee's hearings. As previously noted, while the record may be silent as to how many senators took advantage of the opportunity to view the hearings or videotape, there is no evidence that they did not do so.

Even if petitioner is correct that the senators who voted on the impeachment charges brought against petitioner did not review the tapes to determine the demeanor of the witnesses whose credibility were at issue, the petitioner's conclusion does not necessarily follow in light of petitioner's concession during oral argument in the Court of Appeals below that petitioner's constitutional right to a "trial" of the impeachment charges brought against him would be satisfied if the hearings held by the Impeachment Trial Committee were held on the floor of the Senate, even

if fewer than twelve senators were present for the hearing. As Judge Edwards wrote:

> The conclusion that the Constitution permits the use of evidentiary committees seems especially clear in light of the concession by Nixon's counsel at oral argument that the Constitution does not require the attendance of all senators, or even most senators, at an impeachment "trial." The Senate could constitutionally "try" Nixon even with fewer than 12 senators present, Nixon's counsel argued, so long as it was done on the Senate floor. But the constitutional significance between that scenario and the sort of evidentiary proceeding provided Nixon eludes me. To the contrary, I believe that the procedure employed by the Senate in this case -- a prolonged evidentiary hearing before a special commitee followed by review, argument and deliveration by the full Senate -- is far better calculated to achieve the ends intended by the framers, i.e. that the ultimate decision be grounded in evidence rather than partisan passion, that it be arrived at by a "numerous" body and that the fact-finding upon which it is based be conducted with a solemn attention to fairness such as would command the respect and adherence of a potentially divided nation.

938 F.2d at 265. (Edwards, J., dissenting in part and concurring in the judgment). Petitioner unsuccessfully attempted to retract his concession that only a few senators are required to be on the Senate floor during impeachment proceedings in his petition for rehearing. See Pet. App. F at 84a-85a. Even if he were successful, the same argument by Judge Edwards would apply if 51 unattentive senators would be required to be physically present on the Senate floor during the proceedings.

In any event, a ruling on the merits would be frought with mischief and would lead to further litigation by petitioner and others concerning a variety of procedural issues. For example, although the Constitution vests the power to try an impeachment solely in the Senate, could petitioner challenge the use of House managers in that proceeding? Could petitioner challenge the employment of special counsel? Indeed, former Judge Hastings raised that very issue before the Senate Impeachment Committee which denied his motion to exclude special counsel from that proceeding. If the Court reaches the merits of petitioner's claim, presumably Judge Hastings' objection on that point would also be justiciable. The possibilities of other legal challenges are essentially limitless.

CONCLUSION

For the foregoing reasons, *amici curiae* submit that the decision of the court of appeals be affirmed. Alternatively, the lower court should be affirmed on grounds that prudential considerations dictate that this Court should not exercise its discretionary powers by providing petitioner with declaratory relief.

Respectfully submitted,

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